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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~512~~ 219.

THE TERRITORY OF HAWAII, APPELLANT,

vs.

OSAKI MANKICHI.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII.

FILED JANUARY 10, 1902.
(15305.)

25275

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1 In the district court of the United States in and for the Territory of Hawaii.

In the matter of the application of Osaki Mankichi for a writ of habeas corpus.

PETITION.

To the honorable MORRIS M. ESTEE,
Judge of the district court of the United States in and for the Territory of Hawaii:

I.

The humble petition of Osaki Mankichi respectfully represents unto your honor and this honorable court that Osaki Mankichi has been a resident of the Territory of Hawaii and of the Hawaiian Islands for more than three years last past.

II.

That Osaki Mankichi was convicted of the infamous crime of manslaughter in the first degree at the May term of the circuit court of the first judicial circuit of the Territory of Hawaii, A. D. 1899, and that upon such conviction was sentenced to be imprisoned at hard labor for the term of ten years by the judge of the circuit court of the first judicial circuit in the Hawaiian Islands.

III.

That the said Osaki Mankichi is now confined and imprisoned in the Oahu convict prison, and is in the custody of the keeper of said prison and the high sheriff of this Territory, Arthur M. Brown, for the said offense under and by virtue of said conviction and sentence, and the mittimus, which said mittimus was delivered to said high sheriff on
2 the 22d day of May, 1899, a copy of which is attached hereto and made a part of this petition, and which your petitioner craves leave to make a part of this petition and to be considered by your honor upon this application for a writ of habeas corpus.

IV.

And your petitioner further respectfully represents and alleges that said conviction and sentence are absolutely void and contrary to the Constitution of the United States of America, and especially to Article V of said Constitution, in that the indictment which was presented and a true bill was found upon which your petitioner was tried, convicted, and sentenced was not presented to nor was a true bill found thereon by any grand jury duly summoned and acting at a term of the court, but the true bill upon said indictment was found by A. Perry, first judge of the circuit court of the first judicial circuit, presiding at the term, and the

indorsement upon said indictment is in the words and figures following, to wit:

"A true bill found this 4th day of May, A. D. 1899. (Signed) A. Perry, first judge of the circuit court, first judicial circuit, presiding at the term."

V.

Your petitioner further represents and alleges that said conviction and sentence is absolutely void and contrary to the Constitution of the United States in that your petitioner was tried by a jury composed of twelve men, but was convicted and the verdict therein was rendered by nine only of said jurors, three of said jurors who sat upon the trial of said cause dissenting from the said verdict, which will appear from the record
3 in said cause, and which your petitioner prays leave to offer in evidence on the hearing of this application for a writ of habeas corpus.

VI.

Your petitioner further alleges that he is now unlawfully imprisoned, detained, and restrained of his liberty, being confined in Oahu convict prison in the custody of the keeper of said prison and of the high sheriff of this Territory, Arthur M. Brown, esq., and by virtue of the mittimus issued out of the first judicial circuit of the Hawaiian Islands and under said conviction and sentence, which are absolutely void, being contrary to the Constitution of the United States, as hereinbefore set forth in this petition.

Wherefore your petitioner humbly prays that a writ of habeas corpus be issued by your honor, commanding said Arthur M. Brown, high sheriff of this Territory, to have and produce the body of said Osaki Mankichi before your honor and this honorable court, and that the said alleged cause of his imprisonment and detention and the constitutionality of his conviction and sentence may be inquired into, and in case said conviction and sentence are illegal and void that your petitioner may be discharged from such arrest and imprisonment, and as in duty bound your petitioner will ever pray.

(Signed in Japanese.) "OSAKI MANKICHI."

GEORGE A. DAVIS and
F. M. BROOKS,
Of Counsel for Petitioner.

4 TERRITORY OF HAWAII,
Island of Oahu, ss:

And now comes the above-named petitioner, Osaki Mankichi, and being sworn, says that he is the petitioner above named; that he has heard read the foregoing petition, which was fully explained to him, and that he knows the contents thereof and that the same is just and true.

(Japanese signature.) "OSAKI MANKICHI."

Subscribed and sworn to before me this 26th day of August, A. D. 1901.

[SEAL.] WADE WARREN THAYER,
Notary Public, First Judicial Circuit.

In the circuit court of the first judicial circuit of the Hawaiian Islands, May term, 1899.

THE REPUBLIC OF HAWAII
vs.
YAMANE MENCHIRO, IHARA ICHIGORO, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai.

Before Hon. A. Perry, first judge of said circuit court.

MITTIMUS.

The Republic of Hawaii to Arthur M. Brown, esq., marshal of the Republic of Hawaii, or his deputy, greeting:

Osaki Mankichi having been indicted in the circuit court of the first judicial circuit of the Hawaiian Islands, at the May term, 1899, thereof, under an indictment reading as follows:

"In the name of the Republic of Hawaii, first circuit, to wit: At a term of the circuit court, begun and holden at Honolulu, in the island of Oahu, within and for the first circuit of the Hawaiian Islands, on the first day of May, in the year of our Lord one thousand eight
6 hundred and ninety-nine, and continued by adjournment, from day to day, and from time to time, until the fourth day of said month. The attorney-general of the Republic of Hawaii, upon his official oath, presents that Yamane Nenchiro, Ihara Ichigoto, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, all foreigners by birth, of Kahuku, district of Koolauloa, in the island of Oahu, and within the jurisdiction of this honorable court, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, feloniously, wilfully, and of their deliberate premeditated malice aforethought, did kill and murder one Chew Foon Wing, and did then and there and thereby commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

"And the attorney-general aforesaid, upon his official oath aforesaid, doth further say and present that the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, all foreigners by birth, and all of Kahuku, in the district of Koolauloa, island of Oahu, and within the jurisdiction of this honorable court, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, feloniously, wilfully, and of their malice aforethought, without authority, justification, or extenuation by law, and with extreme atrocity and cruelty, did kill and murder one Chew Foon Wing, and did then and there and thereby commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

"And the attorney-general aforesaid, upon his official oath aforesaid, doth further say and present that the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai,
7 all foreigners by birth, of Kahuku, in the district of Koolauloa, island of Oahu, at Kahuka, in the district of Koolauloa, island of Oahu, and within the jurisdiction of this honorable court, on the 26th day of March, in the year of our Lord one thousand eight hundred and

ninety-nine, with force and arms in and upon one Chew Foon Wing, feloniously, wilfully, and of their deliberate, premeditated malice aforethought, and without authority, justification, or extenuation by law, did make an assault with knives, hoes, clubs, sticks, stones, and other weapons to the attorney-general unknown, and did then and there feloniously, wilfully, and of their deliberate premeditated malice aforethought, without authority, justification, or extenuation by law, strike, cut, beat, and bruise the said Chew Foon Wing, then and there and thereby giving to the said Chew Foon Wing certain mortal wounds, of which said mortal wounds he, the said Chew Foon Wing, on the same day, died, and that so the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Uahichi, and Fujimoto Nehai at the time and place aforesaid, and in the manner and form aforesaid, did kill and murder the said Chew Foon Wing, and then and there and thereby did commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

"And the attorney-general aforesaid, upon his official oath aforesaid, doth further say and present that the said Yamane Nenchiro, Ichigoro, Osaki Mankichi, Danjro Uahichi, and Fujimoto Nehai, all foreigners by birth, of Kahuku, in the district of Koolauloa, island of Oahu, at Kahuku, in the district of Koolauloa, island of Oahu, and within the jurisdiction of the honorable court, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, in and upon one Chew Foon Wing, feloniously, wilfully,
8 and of their malice aforethought, and without authority, justification, or extenuation by law, and with extreme atrocity and cruelty, did make an assault with knives, hoes, clubs, sticks, stones, and other weapons to the attorney-general unknown, and did then and there feloniously, wilfully, and of their malice aforethought, without authority, justification, or extenuation by law, and with extreme atrocity and cruelty, strike, beat, and bruise the said Chew Foon Wing, then and there and thereby the said Chew Foon Wing mortal wounds, for which said mortal wounds, he, the said Chew Foon Wing, on the same day, died. And so said Yamen Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, at the time and place aforesaid, and in the manner and form aforesaid, did kill and murder Chew Foon Wing, and then and there and thereby did commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

(Signed) "HENRY E. COOPER,
"Attorney-General.

"A true bill found this 4th day of May, A. D. 1899.

(Signed) "A. PERRY,
"First Judge of the Circuit Court of the First Judicial Circuit, Presiding at the Term."

And the said Osaki Mankichi having been convicted in the said circuit court of the first circuit at the May term, 1899, thereof, under said indictment, of the offense of manslaughter in the first degree, and having been by said circuit on this day sentenced to be imprisoned at hard labor for the term of twenty years,

You are hereby ordered to take said Osaki Mankichi into your custody and to cause said sentence to be executed. Hereof fail not.

9 Witness the honorable A. Perry, first judge of the circuit court of the first circuit, and the seal of said court, at Honolulu, this 22nd day of May, A. D. 1899.

[SEAL.]

(Signed) J. A. THOMPSON,
Clerk of the Circuit Court of the First Circuit.

Let this writ issue returnable before me in the open court of Tuesday, the third day of September, at the hour of two o'clock in the afternoon of said day, and let a copy of this petition, order, and writ be served within two days from the date hereof upon Col. J. C. Baird, U. S. district attorney, and E. P. Dole, the attorney-general of this Territory, or his deputy, John W. Cathcart.

Dated this 26th day of August, A. D. 1901.

MORRIS M. ESTEE,
Judge of the District Court of the United States for the Territory of Hawaii.

(Endorsed:) Title of court and cause. Filed August 26th, 1901. W. B. Maling, clerk. By F. C. Handy, deputy clerk.

10 OFFICE OF THE UNITED STATES MARSHAL
FOR THE TERRITORY OF HAWAII.

I hereby certify that on the 26th day of August, A. D. 1901, I received the writ of habeas corpus hereto attached, and that on the 26th day of August, A. D. 1901, at Honolulu, H. T., in this district, I personally served the said writ, by delivering to and leaving a certified copy thereof with Arthur M. Brown, high sheriff of the Territory of Hawaii.

Dated Honolulu, August 26th, 1901.

D. A. RAY,
U. S. Marshal,
By E. R. HENDRY,
Chief Office Deputy U. S. Marshal.

The President of the United States of America to Arthur M. Brown, esq., high sheriff of the Territory of Hawaii, and to the keeper of Oahu Convict Prison:

We command you and each of you that the body of Osaki Mankichi, by you detained and imprisoned, as is charged, you have before the honorable Morris M. Estee, judge of the district court of the United States for the Territory of Hawaii, at two o'clock in the afternoon on Tuesday, the third day of September, A. D. 1901, at the district court room in the judiciary building in Honolulu, together with the cause of the detention of the said Osaki Mankichi, to undergo and receive what our said judge shall consider concerning him in this behalf, and have you then and there this writ.

Witness the honorable Morris M. Estee, judge of the district court of the United States in and for the Territory of Hawaii, this 26th
11 day of August, A. D. 1901.

[SEAL.] W. B. MALING,
Clerk of the District Court of the United States in and for the Territory of Hawaii,
By F. C. HANDY,
Deputy Clerk.

(Endorsed:) Title of court and cause. Filed August 26th, 1901. W. B. Maling, clerk.

12 In the district court of the United States in and for the Territory of Hawaii.

In the matter of application of Osaki Mankichi for a writ of habeas corpus.

RETURN TO WRIT OF HABEAS CORPUS.

Now comes Arthur M. Brown, high sheriff of the Territory of Hawaii, and makes thus his return to the writ of habeas corpus herein issued and respectfully certifies to this honorable court as follows:

1st. I am the duly appointed and qualified high sheriff of the Territory of Hawaii; that I have said Osaki Mankichi in my custody, and, in obedience to the commands of the said writ, I now produce said Osaki Mankichi before this honorable court.

2nd. That said Osaki Mankichi at the time of the service of the writ herein was in my custody and detained by me at the Oahu jail in the city of Honolulu, island of Oahu, Territory of Hawaii, and is now so in my custody and detained by me, under and by virtue of the judgment of the circuit court of the first circuit, Republic of Hawaii, a court of general jurisdiction held at said Honolulu, in and for said circuit, on the 1st day of May, A. D. 1899, which said judgment was rendered upon a verdict duly returned into court convicting the said Osaki Mankichi of manslaughter in the first degree, in a cause entitled "The Republic of Hawaii against Yamane Nenchiro, Osaki Mankichi, and others," a true copy of which verdict is attached hereto, marked "Exhibit A,"
13 made a part hereof, and referred to hereby; that the trial of said Osaki Mankichi in which said verdict was rendered was had upon an indictment, duly found by law, charging said Osaki Mankichi with murder in the first degree, which said indictment is to set forth in full in the mittimus hereafter alleged, and reference thereto is hereby made; and said Osaki Mank'chi was and is also in my custody and detained by me as such high sheriff, under and by virtue of a mittimus issued out of said circuit court in pursuance of said judgment of conviction, a true copy of which said mittimus is hereto attached as a part hereof, marked "Exhibit B," and is hereby referred to.

3rd. And I, the said Arthur M. Brown, high sheriff of the Territory of Hawaii, do make a further return, and allege, as I am advised, that the said judgment of conviction as hereinbefore set forth, and the aforesaid

mittimus and the custody and imprisonment of the said Osaki Mankichi are lawful and fully warranted by the constitution and laws of the Republic of Hawaii, then in force and effect, and by the act of the Congress of the United States creating the Territory of Hawaii; and I do further allege, as I am advised, that those provisions of Article V and VI of the amendments of the Constitution of the United States relating to presentments and indictments by grand juries and to trial by petit juries were not in force and effect within the Republic of Hawaii, or the Hawaiian Islands, nor applicable thereto, at the time of the indictment, trial, and conviction of the said Osaki Mankichi; and that said Osaki Mankichi is not in custody, imprisoned, or restrained of his liberty contrary to the Constitution of the United States.

4th. And I further certify that I make this return as high sheriff of the Territory of Hawaii.

14 Dated at Honolulu, Sept. 3, 1901, A. D.

A. M. BROWN,
High Sheriff of the Territory of Hawaii.

15 (Copy.)

EXHIBIT A.

In the circuit court of the first circuit, Territory of Hawaii, May term, 1899.

Judge A. Perry, presiding.

THE REPUBLIC OF HAWAII
vs.
YAMANE NENCHIRO, IHARA ICHIGORO, OSAKI Mankichi, Danjro Yahichi, and Fujimoto Nehai. } Verdict.

We, the jury in the above-entitled cause, find the defendant Yamane Nenchiro guilty of manslaughter 3 degree, 2 dissenting.

Find the defendant Ihara Ichigoro guilty of murder first degree, 2 dissenting.

Find the defendant Osaki Mankichi guilty of manslaughter first degree, 3 dissenting.

Find the defendant Danjro Yahichi not guilty, 3 dissenting.

Find the defendant Fujimoto Nehai not guilty, 2 dissenting, dissenting.

(Signed) F. W. MCCHESNEY, *Foreman.*

HONOLULU, OAHU, *18 May, 1899.*

16 EXHIBIT B.

In the circuit court of the first judicial circuit of the Hawaiian Islands, May term, 1899.

THE REPUBLIC OF HAWAII
vs.
YAMANE NENCHIRO, IHARA ICHIGORO, OSAKI Mankichi, Danjro Yahichi, and Fujimoto Nehai.

Before Hon. A. Perry, judge of said circuit court.

MITTIMUS.

The Republic of Hawaii to Arthur M. Brown, esq., marshal of the Republic of Hawaii, or his deputy, greeting:

Osaki Mankichi having been indicted in the circuit court of the first judicial circuit of the Hawaiian Islands, at the May term, 1899, thereof, under an indictment reading as follows:

"In the name of the Republic of Hawaii, first circuit, to wit: At a term of the circuit court begun and holden at Honolulu, in the island of Oahu, within and for the first circuit of the Hawaiian Islands, on the first day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and continued by adjournment from day to day and from time to time, until the fourth day of said month, the attorney-general of the Republic of Hawaii, upon his official oath, presents that Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, all foreigners by birth, of Kahuku, district of Koolauloa, in the island of Oahu, at Kahuku, district of Koolauloa, in the island of Oahu, and within the jurisdiction of this honorable court, on the 26th day of March, A. D. 1899, with force and arms, feloniously, wilfully, and of their deliberate premeditated malice aforethought, did kill and murder one Chew Foon Wing, and then and there and thereby commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

"And the attorney-general aforesaid, upon his official oath
17 aforesaid, doth further say and present, that the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, all foreigners by birth, and all of Kahuku, in the district of Koolauloa, island of Oahu, at Kahuku, in the district of Koolauloa, island of Oahu, and within the jurisdiction of this honorable court, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, feloniously, wilfully, and of their malice aforethought, without authority, justification, or extenuation by law, and with extreme atrocity and cruelty, did kill and murder one Chew Foon Wing, and did then and there and thereby commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

"And the Attorney-General aforesaid, upon his official oath aforesaid, doth further say and present that the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, all foreigners by birth, of Kakuhu, in the district of Koolauloa, island of Oahu, at Kahuku, in the district of Koolauloa, island of Oahu, and

within the jurisdiction of this honorable court, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms in and upon one Chew Foon Wing, feloniously, wilfully, and of their deliberate premeditated malice aforethought, and without authority, justification or extenuation by law, did make an assault with knives, hoes, clubs, sticks, and stones, and other weapons to the Attorney-General unknown, and did then and there feloniously, wilfully and of their deliberate premeditated malice aforethought, without authority, justification, or extenuation by law, strike, cut, beat, and bruise the said Chew Foon Wing, then and there, and thereby giving to the said Chew Foon Wing certain mortal wounds, of which said mortal wounds he, the said Chew Foon Wing, on the same day died, and that so the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, at the time and place aforesaid, and in the manner and form aforesaid, did kill and murder the said Chew Foon Wing, and then and there and thereby did commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

"And the Attorney-General aforesaid, upon his official oath aforesaid, doth further say and present that the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi and Fujimoto Nehai, all foreigners by birth of Kahuku, in the district of Koolualoa, island of Oahu, at Kahuku, in the district of Koolauloa, island of Oahu, and within the jurisdiction of this honorable court, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, in and upon one Chew Foon Wing, feloniously, wilfully, and of their malice aforethought, and without authority, justification, or extenuation by law, and with extreme atrocity and cruelty did make an assault with knives, hoes, clubs, sticks, stones, and other weapons to the Attorney-General unknown, and did then and there feloniously, wilfully, and of their malice aforethought, without authority, justification or extenuation by law, and with extreme atrocity and cruelty, strike, beat, and bruise the said Chew Foon Wing, then and there, and thereby the said Chew Foon Wing, mortal wounds, of which said mortal wounds he, the said Chew Foon Wing on the same day died. And so the said Yamane Nenchiro, Ihara Ichigoro, Osaki Mankichi, Danjro Yahichi, and Fujimoto Nehai, at the time and place aforesaid, and in the manner
18 and form aforesaid, did kill and murder said Chew Foon Wing, and then and there, and thereby did commit the crime of murder in the first degree, contrary to the form of the statute in such case made and provided.

(Signed) "HENRY E. COOPER,
"*Attorney-General.*

"A true bill found this 4th day of May, A. D. 1899.

(Signed) "A. PERRY,
"*First Judge of the Circuit Court of the First*
"*Judicial Circuit, Presiding at the term.*"

And the said Osaki Mankichi, having been convicted in the said circuit court at the May term, 1899, thereof, under said indictment, of the offense of manslaughter in the first degree, and having been by said

circuit court of the First circuit on this day sentenced to be imprisoned at hard labor for the term of twenty years.

You are hereby ordered to take said Osaki Mankichi into your custody, and to cause said sentence to be executed. Hereof fail not.

Witness the honorable A. Perry, first judge of the circuit court of the first circuit and the seal of said court, at Honolulu, this 22d day of May, A. D. 1899.

[SEAL.] (Signed) J. A. THOMPSON,
Clerk of the Circuit Court of the First Circuit.

(Endorsed:) Title of court and cause. Filed September 3, 1901. W. B. Maling, Clerk. By F. C. Handy, Deputy Clerk.

19 [From minutes of U. S. district court, September 3, 1901, page 363.]

Title of court and cause.

Now comes the high sheriff, A. M. Brown, respondent herein, with his counsel, and produced the body of petitioner and made return to the writ herein.

And thereupon counsel for petitioner and the respondent commenced the argument of the matter, and the hour for adjournment having arrived, the future hearing is continued until Wednesday, Sept. 4, 1901, at 10 a. m.

20 [From the minutes of U. S. district court, September 4, 1901, page 364.]

Title of court and cause.

Now again comes the respondent herein with his counsel and his petitioner, and his counsel also being present, the matter is continued by further argument and the hour for adjournment having arrived, it is ordered continued until Thursday, September 5th, 1901.

21 [From minutes of district court of the United States, September 5th, 1901, page 365.]

Title of court and cause.

On this day again comes the respondent and the petitioner herein with their respective counsel, and the matter is proceeded with by further argument, at the conclusion of which it is submitted to the court for decision, and the court took the matter under advisement and ordered that counsel have until September 7th, 1901, at noon to submit points and authorities.

22 In the United States court in and for the Territory of Hawaii.

In the matter of the application of Osaki Mankichi for a writ of habeas corpus.

George A. Davis, Esq., and F. M. Brooks, appearing as counsel for petitioner; John W. Cathcart, Assistant Attorney-General, appearing as counsel for high sheriff of the Territory, Arthur M. Brown.

OPINION OF THE COURT.

This is an application for a writ of habeas corpus arising upon the petition of one Osaki Mankichi, a Japanese.

The evidence, oral and documentary, shows that on the 4th day of May, 1899, a presentment was filed against the petitioner by the then circuit judge of the first circuit of the Territory of Hawaii, and without the intervention of a grand jury, charging him with the crime of murder; that afterwards in the May term of that court, of the same year, he was tried on the said presentment and convicted of the crime of manslaughter in the first degree. The verdict was returned by nine out of the twelve jurors. On the 22nd day of May, 1899, he was, by the said court, sentenced to twenty years imprisonment at hard labor.

Petitioner now seeks his discharge upon the ground that he is being illegally imprisoned, because of the fact that he was not indicted
23 by a grand jury, nor convicted by the unanimous verdict of a jury of twelve men, as is required by the Constitution of the United States, it being claimed that the Constitution of the United States was in force in these islands during the period covered by the trial, conviction, and sentence of petitioner, and that Articles V, VI, and VII of the amendments to the Constitution were thus violated.

(I) The first point made by the learned assistant attorney-general for the Territory is that this court has no jurisdiction to act and determine upon the questions involved in this matter, because of writ of error should be sued out of the Supreme Court of the United States by the petitioner herein; that whatever may have been the action of the Territorial courts, the United States court ought not to interfere; that this case is not one of sufficient gravity to call for the interposition of this court on habeas corpus.

This is a Federal question raised in the territory of the United States, which is governed by Federal law under the Constitution and statutes of the United States. The authorities referred by the deputy attorney-general, sustaining his position against this court's assuming jurisdiction in this proceeding, are not in point. Not one of the decisions cited relate to this class of cases. This Territory is under the control of Congress and is not an independent State with a Constitution and local statutes governing the trial and conviction or acquittal of persons charged with crime. Where a State is a party and where a constitutional question is involved, a writ of error should, save in exceptional cases, be sued out of the Supreme Court of the United States, because of a delicate nature of a conflict of State and National jurisdictions. Here there can be no such conflict. I have been unable to find any authori-
24 ties of like import where a conviction is had in a Territory. Territorial action alone is involved here. The courts which have considered this matter before are all territorial courts, the alleged conviction of petitioner occurring under territorial law.

It should be here said that the territorial situation of Hawaii is peculiar. We are by land and sea over five thousand miles from the capital of our country and practically the judicial officers of this Territory are beyond the immediate range of appellate judicial tribunals. So all judicial officers here should be especially interested in maintaining

public law in this Territory and more particularly in maintaining the Constitution and statutes of the United States applicable hereto.

In this habeas corpus matter there is a wide difference of opinion among the Territorial judges. Both the supreme and circuit courts differ with each other, and the members of the supreme court differ among themselves; and especially so upon the question of the relation which this Territory bears to the Constitution and laws of the United States; for instance, the supreme court of this Territory held in the very recent case of Honomu Sugar Co. vs. Sayewiz (12 Haw., 96), that certain amendments of the Constitution of the United States were not in force here between the 7th day of July, 1898, and the 14th day of June, 1900, namely, Articles V, VI, and VII, and XIII, which articles relate to indictment by a grand jury for infamous crimes, to a common-law jury trial, and to the existence of slavery in this Territory of the United States. While the supreme court decided in the case of Ex parte Edwards (13 Haw., 32) that no person could be put up on trial for infamous crime in the Hawaiian Islands after August 12, 1898 (the date of the raising of the American flag here) without having been first indicted by a grand jury, nor could he be convicted of such crime
25 save by the unanimous verdict of a jury of twelve.

It was further held by the supreme court of the Territory on the 5th day of June, 1899, in the case of Spencer vs. Collector of Customs (12 Haw., 66), that Hawaii could register vessels although the Territory was annexed to and formed a part of the United States.

This was practically overruled by the Attorney-General of the United States, who, in a written opinion (22 Op. Atty. Gen., 578), instructed the Secretary of the Treasury that—

"With due respect to the judgment of the supreme court of Hawaii, I am unable to admit that an Hawaiian register can now be issued to a vessel, and the flag of Hawaii, the usual token of registration, be flown by her."

From these decisions it is clear there is a wide divergence of opinion on the part of the members of the supreme court of the Territory as to the constitutional question involved herein, and as to whether or not the people of this Territory were, during the period between July 7, 1898, and June 14th, 1900, living in an American Territory and subject to such laws as were not inconsistent with joint resolution of annexation "nor contrary to the Constitution of the United States."

The familiar rule of stare decisis does not seem to receive recognition by the supreme court of the Territory, for the court decides one way at one time and another way at other times upon questions of the gravest importance and which cases involve identically the same principle. The very uncertainty of that court's opinions tends to disturb and unsettle the public mind as to the National Constitution and its application to the people of and conditions in this Territory, and is a strong inducement for this court to exercise its discretion in taking jurisdiction of this proceeding.

26 It is argued that the district and circuit courts of the United States are courts of original and limited jurisdiction, which is true; but the United States statutes make it the duty of the United States district and circuit judges to issue the writ of habeas corpus when justice

demands it, or when "a person is in custody in violation of the Constitution." (Section 753, Rev. Stats. U. S., 2nd ed.)

"It is the duty of the courts to be watchful of the constitutional rights of the citizen." (Boyd vs. U. S., 116 U. S., 616 to 636.)

So constitutional provisions for the security of persons and property should be liberally construed. (Id., 636.)

As was said by the Supreme Court of the United States in the case of Walker vs. S. P. R. R. Co., 165 U. S., quoting from page 595–6:

"We deem it unnecessary to consider the contention of defendant in error that the Territorial courts are not courts of the United States and that the seventh amendment is not operative in the Territories, for in the act of April 7, 1874, c. 80 (18 Stat., 27), Congress, legislating for all the Territories, declared 'that no party shall be deprived of the right of trial by the jury in cases cognizable at common law;' and while this may not in terms extend all the provisions of the seventh amendment to the Territories, it does secure all the rights of trial by jury as they existed at common law."

If it be true that the Constitution and the act of Congress referred to in Walker vs. S. P. R. R. Co., supra, has been nullified by the local Territorial courts, then there should be an immediate remedy.

The learned Assistant Attorney-General on the argument pressed upon the attention of the court the fact that on October 20th, 1900, this court dismissed the petition for a writ of habeas corpus presented in the case of In re Marshal on the ground of lack of jurisdiction. In that case the petitioner had been convicted of a misdemeanor and no Federal
27 question was involved; the court then saying generally that "only in very rare and extreme cases will it review upon habeas corpus the judgments or verdicts found in the highest Territorial courts of the Territory." And this court is still of the same opinion.

The question now presented is, Is this an exceptional case? I am compelled to believe that it is. Whatever the intention of the local Territorial courts, their decisions upon this question are an attack upon the constitutional rights of the citizen, affecting life and liberty, which are thereby made insecure.

In view of all the circumstances, therefore, I think it would be in furtherance of public justice for me to exercise my discretion by assuming jurisdiction in this proceeding. I shall therefore consider the case under the writ.

The right of appeal in habeas corpus cases from the Territorial circuit to the Territorial supreme court this court will not consider. That is a matter entirely within the province of the Territorial courts.

So, also, as to the objections submitted in relation to Mr. Justice Parry sitting as one of the appellate judges in this case, originally tried by him while a circuit judge. That is largely a matter of discretion on his part, and I will not assume to question the wisdom of such discretion.

(II) Petitioner claims that he is in custody in violation of the Constitution of the United States, in that he was tried and convicted of an infamous crime without an indictment by a grand jury, and by a verdict of less than twelve jurors, i. e., by nine of the twelve jurors. The specific
articles of the Constitution claimed to have been violated by such
28 conviction are Articles V, VI, and VII of the amendments thereto.

There is no question as to the infamous character of the crime with which he was charged.

The joint resolution of both Houses of Congress annexing the Hawaiian Islands, passed by Congress July 7th, 1898, prescribes, among other things, that—

"The Hawaiian Islands and their dependencies are hereby annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and all and singular the property and rights hereinbefore mentioned are vested in the United States of America."

After providing for the disposition of the revenues of the islands and for the future enactment by Congress of special public-land laws, the resolution then prescribes:

"The municipal legislation of the Hawaiian Islands not inconsistent with this resolution, nor contrary to the Constitution of the United States, shall remain in force until the Congress of the United States shall otherwise determine." (Vol. 30, U. S. Stats., 750.)

Municipal law is defined to be—

"The rule of law by which a particular district, community, or nation is governed." (1 Blackstone's Comm., 44; 1 Kent's Comm., 447; 2 Burrell's Law Dictionary, 215.)

The resolution of annexation of Hawaiian Islands as passed by Congress prescribes that "they are annexed as a part of the territory of the United States" and are "subject to the sovereign dominion thereof," and on August 12th, 1898, the American flag was raised on the islands. It matters not, technically, whether the Constitution followed the flag or followed American sovereignty here. With American sovereignty came all of American law not especially reserved by the joint resolu-
29 tion of annexation. It goes without saying that two sovereignties could not exist here at the same time, and when the resolution of annexation provided that "the municipal legislation of the Hawaiian Islands not inconsistent with this joint resolution nor contrary to the Constitution of the United States should remain in force," it meant that all municipal legislative enactments of the Republic of Hawaii contrary thereto should be abrogated. No reservation was made in the joint resolution of Articles V, VI, and VII of the amendments to the Constitution, relating to indictments or trial by jury in common-law or criminal cases.

It shows that American sovereignty not only prevailed here, as elsewhere in the Territories of the United States, but that nothing could be done or permitted here contrary to the Constitution of the United States, excepting as expressly provided in the joint resolution of annexation. This annexation was not, as claimed by the supreme court of the Territory in the case of Peacock vs. Republic of Hawaii (12 Haw., 33), in a transition of inchoate state, but was complete, and the Constitution came with annexation and became and ever since has been the supreme law of this Territory. This is of paramount interest to the people of the Territory, as it secures to all the equal protection of life, liberty, and property, which are fundamental rights, and chief among which is the trial by jury.

It appears that the petitioner was indicted for the crime of murder

under an indictment presented by the prosecuting officer of the Territory and found by the circuit judge of the circuit court, under the provisions of section 616 of the penal laws of 1897 of the Republic of Hawaii, which reads as follows:

"The necessary bills of indictment shall be prepared by a legal prosecuting officer and be duly presented to the presiding judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not."

30 The petitioner was then tried upon the said indictment, and a verdict of conviction of manslaughter was rendered by nine out twelve jurors who heard the case in accordance with section 1345 of the civil laws of 1897 of the Republic of Hawaii, which prescribes as follows:

"No jury, for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve."

The questions then presented are:

Where the provision' of the penal and civil laws of the Republic of Hawaii under which this petitioner was indicted, tried, and convicted, "municipal legislation contrary to the Constitution of the United States;" or, in other words,

Could a person in the Territory of Hawaii, between the 7th day of July, 1898, and the 14th day of June, 1900, when the act for the government of the Territory of Hawaii went into effect, be legally tried for an infamous crime without having been first indicted by a grand jury as required by Article V of the amendments to the Constitution of the United States, or convicted by less than an unanimous verdict of twelve jurors, as provided by Articles VI and VII of said amendments?

Article V of the Constitution of the United States reads in part as follows:

"No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Even if this Constitutional provision had never been construed, the language is too plain for doubt.

31 It has been held by the Supreme Court of the United States that the fifth and sixth amendments to the Constitution were not designed as limits upon the State governments in reference to their own citizens, but are only restrictions upon the Federal power. (Barron vs. Baltimore, 7 Peters, 243; Thorington vs. Montgomery, 147 U. S., 490.)

The Hawaiian Islands were territory of the United States, "subject to the sovereignty thereof" and under the control of Congress, when the original proceedings in this matter were heard before the circuit court of the Territory.

Mr. Justice Bradley held, in the case of the Mormon Church vs. The United States (136 U. S., 1)—

"That the power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. * * *

"It would be absurd to hold that the United States had power to acquire territory and no power to govern it when acquired."

To the same point let me add that it was recently decided in the case of Downes vs. Bidwell (181 U. S., 779), quoting with approval from the decision of Chief Justice Marshall in McCullough vs. Maryland (4 Wheaton, 316)—

"That the power over the Territories is vested in Congress without limitation, and this power has been considered the foundation upon which the Territorial Government rests."

As to Territorial authorities on questions of Territories being subject to Federal provisions, see Bradford vs. Terr. (1 Okl., 366); Walker vs. N. M. R. R. Co. (7 N. Mex., 282).

In the exercise of the plenary power conferred upon it Congress
32 provided, by the joint resolution of annexation, that all municipal legislation of the Republic of Hawaii "contrary to the Constitution of the United States" should be repealed, leaving in force all that was not in conflict therewith. No language could be plainer. I am constrained to hold that it was the intention of Congress to extend the Constitution, save as limited by the other provisions of the joint resolution, over these islands, and any other construction would be straining after that which does not appear in the language of the act.

As was said by the Supreme Court of the United States in the recent Insular cases (Downs vs. Bidwell, 181 U. S., 781):

"When the Constitution has been once formally extended by Congress to the Territories, neither Congress nor the Territorial legislature can enact laws inconsistent therewith." And if Congress can not control the constitutional rights of citizens after they have once been extended to them in the Territories, how can the Territories themselves do this through their courts or otherwise?

See Thompson vs. Utah (170 U. S.), where the court, at page 349, says:

"Assuming that the provisions relating to trials for crimes and to criminal prosecutions apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the sixth amendment thereto is a jury constituted as it was at common law of twelve persons, neither more nor less . This question must be answered in the affirmative."

Quoting approvingly from Springville vs. Thomas (166 U. S., 707), where the court says:

"In our opinion the seventh amendment secured unanimity in finding a verdict, as an essential feature of trial by jury in common-law cases; and the act of Congress could not impart the power to change the constitutional rule and could not be treated as attempting to do so."

And again, on page 355 (Thompson vs. Utah, supra), the court
33 says:

"The Constitution of the United States gave the accused at the time of the commission of the offense a right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such jury."

See also Wester vs. Reid, 11 How., 437, 460; American Publishing Co. vs. Fisher, 166 U. S., 464, 468.

The finding of a true bill by a circuit judge, or in any other manner than by the indictment of a grand jury properly and legally empowered to act in the premises, is in direct violation of the provisions of Article V of the amendments to the Constitution of the United States, and any person in this Territory found guilty of an infamous crime without such indictment by a grand jury is illegally convicted and should be released on habeas corpus. (Ex parte Bain, 121 U. S., 1; Ex parte Parks, 93 U. S., 18; Callon vs. Wilson, 127 U. S., 540.)

It is fallacious to attempt to limit the force of the Constitution in this Territory, or, in view of the clear intent of the resolution of annexation, to curtail the constitutional rights of the citizen. The pointing out to the people, as the supreme court of the Territory has done, that the Constitution "is not here in all its fullness," without stating what parts are and what parts are not here, simply befogs the question, and the argument of the assistant attorney-general of the Territory that trial by jury is not one of the fundamental propositions of the Constitution is contrary to the settled opinions of such illustrious American jurists as Marshall, Story, and Kent, and also of the leading American statesmen who assisted in framing those amendments to the Constitution.

The history of the trial by jury is the history of English and American civilization. It has come down to us from Magna Charta, and in
34 criminal cases every presumption is in favor of sustaining it.

I am of the opinion that the proceedings in the Territorial courts of Hawaii for the indictment and conviction of the petitioner herein were contrary to law and void, and that he is entitled to be discharged on habeas corpus.

Let the prisoner be discharged.

ESTEE, *Judge.*

Dated: September 12th, 1901.

(Endorsed:) Title of court and cause. Filed September 12th, 1901. W. B. Maling, clerk, by F. C. Handy, deputy clerk.

35 [From minutes of U. S. district court, September 12, 1901, page 371.]

Title of court and cause.

Counsel for respondent being present and also the petitioner with his counsel, the court rendered an opinion and decision adjudging that the proceedings in the Territorial courts of Hawaii for the indictment of the petitioner herein were contrary to the law and void, and ordered that the prisoner be discharged and go hence, to which decision counsel for respondent duly accepted and gave notice of appeal.

36 In the district court of the United States of America in and for the Territory of Hawaii.

In the matter of the application of Osaki Mankichi for a writ of habeas corpus.

ASSIGNMENT OF ERRORS.

Now comes the Territory of Hawaii by its attorney, Edmund P. Dole, attorney-general of said Territory, and says: That in the record and

proceedings in said cause and matter there is manifest error in this, to wit:

1st. The court erred in granting the application for a writ of habeas corpus.

2nd. The court erred in assuming jurisdiction of the said application for a writ of habeas corpus.

3rd. The court erred in holding that the defendant should have been indicted by a grand jury.

4th. The court erred in holding that the verdict of guilty should have been an unanimous verdict.

5th. The court erred in holding that Article V of the amend-
37 ments to the Constitution of the United States was in force and effect within the boundaries of the Hawaiian Islands at the time of the indictment, trial, conviction, and sentence of said Osaki Mankichi.

6th. The court erred in holding that Article VI of the amendments to the Constitution of the United was in force and effect within the boundaries of the Hawaiian Islands at the time of the indictment, trial, conviction, and sentence of said Osaki Mankichi.

7th. The court erred in holding that the sentence was null and void.

8th. For other errors appearing upon the record.

Whereas by the law of the land the said writ of habeas corpus should have been discharged and the prisoner remanded to Oahu prison to serve out his sentence.

And the Territory of Hawaii prays that the order and judgment aforesaid may be reversed and annulled and held for naught, and for such relief as may be proper in the premises.

EDMUND P. DOLE,
Attorney-General for the Territory of Hawaii.

(Endorsed:) Title of court and cause. Filed November 15th, 1901 W. B. Maling, clerk.

38 In the district court of the United States of America in and for the Territory of Hawaii.

In the matter of the application of Osaki Mankichi for a writ of habeas corpus.

APPEAL.

The Territory of Hawaii, by its attorney, Edmund P. Dole, attorney-general of said Territory, feeling itself aggrieved by the order and judgment entered on the 12th day of September, 1901, in the proceeding aforesaid, does hereby appeal from the said order to the Supreme Court of the United States, and prays that its appeal may be allowed and a transcript of the record of proceedings and papers upon which said order is made, duly authenticated, may be sent to the Supreme Court of the United States of America.

EDMUND P. DOLE,
Attorney-General for the Territory of Hawaii.

39 In the district court of the United States of America in and for the Territory of Hawaii.

In the matter of the application of Osaki Mankichi for a writ of habeas corpus.

ORDER ALLOWING APPEAL.

And now, to wit, on the 16th day of November, 1901, it is ordered that the appeal of the Territory of Hawaii be allowed as prayed for.

And it is further ordered that the said petitioner, Osaki Mankichi, may, at any time pending said appeal, be enlarged upon executing a recognizance with sureties in the sum of no bail dollars, to the satisfaction of the clerk of this court, for his appearance to answer judgment of the Supreme Court of the United States, and upon failure thereof to give bail, to remain in the custody of the jailor of Oahu prison, Territory of Hawaii.

MORRIS M. ESTEE, *District Judge.*

(Endorsed:) Title of court and cause. Appeal and order allowing appeal. Filed November 16th, 1901. W. B. Maling, clerk.

40 In the district court of the United States of America in and for the Territory of Hawaii.

In the matter of the application of Osaki Mankichi for a writ of habeas corpus.

BOND ON APPEAL.

Know all men by these presents that the Territory of Hawaii, as principal, and H. C. Austin and B. H. Wright, as sureties, are held and firmly bound unto Osaki Mankichi in the full and just sum of five hundred dollars, to be paid to the said Osaki Mankichi, his attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 16th day of November, in the year of our Lord one thousand nine hundred and one.

Whereas lately, at a session of the district court of the United States for the Territory of Hawaii, in the application made by the said Osaki Mankichi for a writ of habeas corpus, an order was entered

41 allowing the said writ of habeas corpus and discharging the said Osaki Mankichi from custody; and the said Territory of Hawaii having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the order aforesaid, and a citation directed to the said Osako Mankichi is about to be issued, citing and admonishing him to be and appear at the Supreme Court of the United States in the city of Washington, District of Columbia:

Now the condition of the above obligation is such that if the said Territory of Hawaii shall prosecute its said appeal to effect, and shall pay

all costs that may be awarded against it, then the above obligation is to be void; otherwise to remain in full force and virtue.

[SEAL.] THE TERRITORY OF HAWAII,
By STANFORD B. DOLE, *Governor.*

[SEAL.] H. C. AUSTIN.
[SEAL.] B. H. WRIGHT.

Attest:

HENRY P. COOPER,
Secretary of the Territory of Hawaii.

The foregoing appeal bond is hereby approved as to form, amount, and sufficiency of sureties this 16th day of November, 1901.

MORRIS M. ESTEE, *Judge.*

(Endorsed:) Title of court and cause. Filed, November 16th, 1901. W. B. Maling, clerk.

42 In the district court of the United States for the district of Hawaii.

In the matter of the application of Osaki Mankichi, for a writ of habeas corpus. No. 14.

CLERK'S CERTIFICATE TO RECORD.

UNITED STATES OF AMERICA,
District of Hawaii, ss:

I, Walter B. Maling, clerk of the district court of the United States for the district of Hawaii, do hereby certify the foregoing forty-one (41) typewritten pages, numbered from one (1) to forty-one (41), inclusive, to be a full, true, and correct copy of the record and all proceedings had in the foregoing and therein entitled cause as the same remains of record and on file in the office of the clerk of the district court of the United States for the district of Hawaii, and that the same constitutes the transcript of the record on appeal in said cause from the district court of the United States for the district of Hawaii to the Supreme Court of the United States.

I further certify that I hereto annex and herewith transmit the original citation on appeal in said cause.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of twelve dollars and sixty
43 cents ($12.60), and that the same was paid by the appellant, territory of Hawaii.

In witness whereof I have hereunto set my hand and seal of said district court this November 25, 1901.

[SEAL.] WALTER B. MALING,
Clerk of the United States District Court for the Territory of Hawaii.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Osaki Mankichi and F. M. Brooks, his attorney, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America at the city of Washington in the District of Columbia, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the district court of the United States for the Territory of Hawaii, wherein the Territory of Hawaii is appellant and you are appellee, to show cause, if any there be, why the order and judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 16th day of November, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

MORRIS M. ESTEE,
United States District Judge of the Territory of Hawaii.

Attest:
[SEAL.]

W. B. MALING,
Clerk District Court of the United States for the Territory of Hawaii.

45 UNITED STATES OF AMERICA,
Territory of Hawaii, ss:

I hereby certify that I served the within citation upon Osaki Mankichi on the 16th day of November, 1901, at the city of Honolulu, island of Oahu, in the Territory of Hawaii, by then and there delivering to the said Osaki Mankichi, personally, a true copy of the within citation.

And I further certify that I served the within citation on the within-named F. M. Brooks, attorney for said Osaki Mankichi, on the 16th day of November, 1901, at the city of Honolulu, island of Oahu, Territory of Hawaii, by then and there delivering to said F. M. Brooks, personally, a true copy of the within citation.

Dated at Honolulu, Territory of Hawaii, this 16th day of November, 1901.

E. R. HENDRY,
United States Marshal.

Marshal's fees.
Service two citations.
Mileage.

46 (Indorsed:) 14. In the district court of the United States of America, Territory of Hawaii. In the matter of the application of Osaki Mankichi for a writ of habeas corpus. Citation. Filed Nov'r 16, 1901, at o'clock and minutes m. W. B. Maling, clerk. By , deputy clerk.

47 (Indorsement on cover:) File No. 18365. Hawai' Territory, D. C. U. S. Term No. 512. The Territory of Hawaii, appellant, vs. Osaki Mankichi. Filed January 10, 1902.

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IN THE SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE APPLICATION OF OSAKI MANKICHI FOR A WRIT OF HABEAS CORPUS.

APPEAL OF THE TERRITORY OF HAWAII FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID TERRITORY.

STIPULATION.

It is hereby stipulated and agreed that the following facts shall form a part of the record in this case on appeal and be submitted to the Supreme Court for consideration:

I.

The defendant made an application for a writ of habeas corpus to Circuit Judge Gear, who granted the writ and discharged the prisoner upon the ground that his trial, conviction, and sentence were void, being in violation of Articles V and VI of the amendments to the Constitution of the United States.

II.

The Territory appealed to the supreme court of the Territory, who reversed the decision and judgment of the circuit judge. Associate Justice Perry, who, when circuit judge, found the true bill upon the indictment against the defendant, and who tried and sentenced the prisoner, sat in the supreme court of the Territory and heard the appeal and rendered a decision therein. The Territorial supreme court was composed of a chief justice and two associate justices. Associate Justice Galbraith dissented.

E. P. DOLE,
Attorney-General of the Territory of Hawaii.

The 28th of Feb'y, A. D. 1902.

GEO. A. DAVIS,
Counsel for Appellee.

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25289

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE TERRITORY OF HAWAII, APPELLANT,
v.
OSAKA MANKICHI.
No. 512.

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII.

MOTION TO ADVANCE.

This is an appeal by the Territory of Hawaii from an order of the district court of the United States for that Territory discharging the petitioner, Osaka Mankichi, from further imprisonment under a conviction of manslaughter.

The question involved arises under the Constitution of the United States, and is whether, after the adoption of the resolution of annexation of July 7, 1898, and prior to the establishment of the Territorial government on June 14, under the act of April 30, 1900, organizing the Territory, the fifth and sixth amendments to the Constitution were in force in Hawaii, so as to render void all indictments, trials, and convictions in criminal cases under the municipal laws of the Republic of Hawaii, which, under the express provisions of the resolution of annexation, remained in

force until Congress should establish a Territorial government there.

Under the Hawaiian law in force in the islands during the rule of the Republic of Hawaii and of the monarchy which preceded it, the grand jury and petit jury of the Anglo-Saxon system were unknown. Indictments were prepared by the prosecuting officer and certified to by the judge, while an agreement of nine out of twelve petit jurors was sufficient to authorize a verdict in a criminal trial.

The following was the provision relative to indictments:

> The necessary bills of indictment shall be duly prepared by a legal prosecuting officer and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not. (Section 616, Penal Laws of 1897.)

And this was the provision regulating verdicts:

> No jury for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve. (Section 1345, Civil Laws of 1897.)

The appellee was indicted pursuant to section 616, above quoted, for murder in the first degree; was tried by a jury of twelve men; was convicted of manslaughter in the first degree, three jurors dissenting,

and was sentenced to imprisonment for the term of twenty years—all occurring after the passage of the resolution of annexation, and before the taking effect of the act providing a government for the Territory.

The position of the government of Hawaii during the transition period that the fifth and sixth amendments of the Constitution of the United States did not operate to change the existing system of penal law was unanimously sustained by the supreme court of Hawaii during that time. (*Republic* v. *Edwards*, 11 Haw., 571; *Republic* v. *Edwards*, 12 Haw., 55; *Peacock* v. *Republic*, 12 Haw., 27.)

The reorganization of the courts, pursuant to the organic act of the Territory, was followed by habeas corpus proceedings to test the validity, under the Constitution of the United States, of these decisions, and of course of all convictions during the transition period. On the same day two opinions of the supreme court of the Territory were filed, one holding that the fifth and sixth amendments took effect on the adoption of the resolution of annexation in 1898; the other that they did not take effect until the organization of the Territory under the organic act in 1900. This conflict was made possible by a provision of the law of Hawaii to the effect that when one of the justices of the supreme court of that Territory is absent or disqualified a circuit court judge or a member of the bar may sit in his place. Chief Justice Frear and Associate Justice Galbraith held opposite views, and in the Marshall case the substitute for Justice Perry, who was absent, concurred with Judge Frear, while in the Edwards case

the substitute for Judge Perry, being another person, concurred with Judge Galbraith.

Marshall, upon being remanded to the jail by the supreme court of the Territory, brought habeas corpus proceedings in the district court of the United States. Judge Estee declined to assume jurisdiction. His opinion intimated a belief at that time that the fifth and sixth amendments did not take effect until the organization of the Territory in 1900.

After this, numerous cases of habeas corpus, including one in behalf of Osaka Mankichi, the appellee herein, were brought before Judge George D. Gear, second judge of the first circuit (Territorial) court. He held that the Constitution of the United States was extended to the islands *in toto* by the resolution of annexation, and that all the convictions during the transition period were void. On appeal, the supreme court of the Territory reversed him, Justice Galbraith dissenting, and the petitioners were remanded to imprisonment at hard labor. A petition for a writ of habeas corpus was then presented in behalf of Osaka Mankichi to Judge Estee, which he granted, having apparently changed the views which he intimated in the Marshall case. From his decision an appeal has been taken by the Territory to this court. Under like circumstances, Judge Gear, since the decision of Judge Estee, has discharged prisoners on habeas corpus, declaring that the decisions of the supreme court of the Territory violate the Constitution of the United States, and are, therefore, not binding on him.

Numerous criminals convicted of the highest crimes known to the law, having thus been discharged on habeas corpus owing to this conflict of authority, have been rearrested by the orders of the attorney-general of Hawaii, indicted by grand juries under the existing penal system, and are now awaiting trial. In most of these cases so much time has elapsed since the commission of the crime and the witnesses are so scattered that it is doubtful whether evidence sufficient to secure a reconviction is obtainable. But if these criminals were retried and reconvictions obtained, the supreme court of the Territory of Hawaii would, as things stand, unquestionably set them aside on the ground that the prior convictions were legal. Owing to this conflict of judicial authority the most dangerous characters will be turned loose on the community in those islands unless the important constitutional question involved is promptly settled by a decision of this court.

For these reasons, it seems to me that this case involves a public question of serious concern, not only to the Territory of Hawaii, but to the United States, which is deeply interested in the punishment of crime there; and I therefore submit that the case ought to be advanced for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on opposing counsel, who is now in Washington.

JOHN K. RICHARDS,
Solicitor-General.

JANUARY 16, 1902.

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No. 573-512

Office Supreme Court U.S.
FILED
MAR 26 1902
JAMES H. MCKENNEY,
Clerk.

Atty. Gen. (Restored) for
Filed Mar. 26, 1902.

In the Supreme Court OF THE UNITED STATES.

In the Matter of the Application of Osaki Mankichi for a Writ of Habeas Corpus.

Appeal of the Territory of Hawaii from the District Court of the United States in and for Said Territory.

BRIEF FOR APPELLANT

BY

EDMUND P. DOLE

Attorney-General of the Territory of Hawaii.

HONOLULU:
HAWAIIAN GAZETTE PRINT
1902

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

APPEAL OF THE TERRITORY OF HAWAII FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID TERRITORY.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

The Grand Jury system was foreign to Hawaiian law under the Republic of Hawaii and the Monarchy which preceded it.

"The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding Judge of the Court before the arraignment of the accused, and such Judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." Section 616, Penal Laws of 1897.

Unanimous verdicts were not required.

"No jury, for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve." Section 1345, Civil Laws of 1897.

The appellee was indicted pursuant to Section 616 above quoted, for murder in the first degree; was tried by a jury of twelve men; was convicted of manslaughter in the first degree, three jurors dissenting, and was sentenced to imprisonment for the term of twenty years,—all between the surrender of Hawaiian sovereignty and the going into effect of the act entitled "An Act to Provide a Government for the Territory of Hawaii," passed by the Fifty-sixth Congress on the 27th day of April, approved on the 30th day of April and taking effect on the 14th day of June, 1900. After the organization of the Territory, the appellee applied to the District Judge of the United States District Court of the Territory of Hawaii for a writ of habeas corpus. He was discharged on the ground that the indictment was contrary to the Fifth Amendment to the Constitution of the United States, and the conviction contrary to the Sixth Amendment.

II.

Assignments of Error.

The Territory appeals upon the following assignments of error:

1st. The Court erred in granting the application for a writ of habeas corpus.

2nd. The Court erred in assuming jurisdiction of the said application for a writ of habeas corpus.

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3rd. The Court erred in holding that the defendant should have been indicted by a Grand Jury.

4th. The Court erred in holding that the verdict of guilty should have been an unanimous verdict.

5th. The Court erred in holding that Article V. of the Amendments to the Constitution of the United States was in force and effect within the boundaries of the Hawaiian Islands on May 4th, 1899 and on May 18th, 1899.

6th. The Court erred in holding that Article VI. of the Amendments to the Constitution of the United States was in force and effect within the boundaries of the Hawaiian Islands on May 4th, 1899 and on May 18th, 1899.

7th. The Court erred in holding that the sentence was null and void.

8th. For other errors appearing upon the record.

III.

ARGUMENT.

Jurisdiction.

Section 86 of the Organic Act of the Territory provides that: "The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." The Supreme Court of the Territory, therefore, for the purposes of appeal to the Supreme Court of the United States, corresponds to the highest court of a state. Seventeen days before the decision

herein appealed from was rendered, the Supreme Court of the Territory held, Justice Galbraith dissenting, that the indictment, trial, conviction and sentence of the appellee were not contrary to the Constitution of the United States, as the Fifth and Sixth Amendments thereof had not at the time of said proceedings been extended to the Hawaiian Islands. *Ex parte Osaki Mankichi*, 13 Haw. 570.

The appellee, having a constitutional right of appeal from this decision by writ of error from the Supreme Court of the United States, it is submitted that the United States District Judge erred in assuming jurisdiction.

I cannot present this branch of the appeal more aptly or more forcibly than by quoting from a decision of the same United States District Judge, rendered October 23rd, 1900, in the matter of the petition of William H. Marshall for a writ of habeas corpus:

"The question presented is: Can this Court, except in very rare and extreme cases, review on habeas corpus the verdict and judgment of the highest Territorial Court of Hawaii, in a criminal question wherein a constitutional question is claimed to be involved, and overrule the action of that Court?

"From the date of the passage of the Judiciary Act of 1867, until now, the Supreme Court of the United States, while always holding that a United States District or Circuit Court had the power in extreme cases to summarily discharge a party from custody who is restrained of his liberty in violation of the Constitution of the United States, yet the same court has uniformly held that except in the most extreme cases the true course for the petitioner was to sue out a writ of error from the Supreme Court of the United States, and thus have the constitutionality of the conviction settled by the only court in the land whose judgment on constitutional questions is final. This rule was adopted because, although the discretionary power existed, yet it was of more than doubtful propriety for a single United States District or

Circuit Judge to interfere with the judicial procedure of a State or Territorial court when dealing with criminal cases.

"It was held in the case of *New York v. Eno*, 155 U. S. 84, that: While the United States courts had the discretionary power to issue the writs of habeas corpus, and to summarily dispose of a party as law and justice requires, 'yet that discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states; and in recognition of the fact that the public good requires that these relations be not disturbed by unnecessary conflicts between courts equally bound to guard and protect rights secured by the Constitution.' * * * "And again: 'Where a circuit court erred in granting the prayer of the petition, the Supreme Court would reverse its action.'

"The court holding in that case, 'that the judgment is reversed with directions to dismiss the writ of habeas corpus and to remand the accused to the custody of the proper authorities.'

"It must be admitted as settled law that this court, like all subordinate courts, is bound by precedent, and peculiarly so where the question involved is one of constitutional law. The Supreme Court of the United States in the very recent case of *Makuson* vs. *Boucher*, 175 U. S. 184, seems to have decided the question of jurisdiction involved in this case beyond dispute. It held as follows: 'We have frequently pronounced against the review by habeas corpus of the judgments of State Courts in criminal cases because some right under the Constitution of the United States was alleged to have been denied to the person convicted and have repeatedly decided the proper remedy was by writ of error. * * * We lately stated the rule,' said the Court, 'and the reasons for it in the cases of *Baker* vs. *Grice*, 169 U. S. 284, and *Tinsley* vs. *Anderson*, 171 U. S. 101-4."

"The court then proceeds to quote approvingly and at length from the latter decision, as well as from *Baker* vs. *Grice*, and adds that: 'The jurisdiction is more delicate, the reasons against its exercise stronger, when a single Judge is

invoked to reverse the decision of the highest court of a state in which the Constitutional rights of a prisoner could have been claimed, and may be were rightly decided; or if not rightly decided could be reviewed and redressed by a writ of error from this court.'

"There is a long line of authorities sustaining the same proposition, that except in peculiarly urgent cases no United States circuit or district court will discharge a prisoner by habeas corpus in advance of the usual and ordinary course by writ of error from the Supreme Court of the United States. (*Pepke* vs. *Cronan*, 155 U. S. 100; *In re Frederick*, 149 U. S. 70-6; *Whitten* vs. *Tomlinson*, 160 U. S. 230, 242; *In re Duncan*, 139 U. S. 449, 454; *In re Wood*, 140 U. S. 278, 289; *Cook* vs. *Hart*, 146 U. S. 183; *In re Loney*, 134 U. S. 372.)

"So also in the case of *In re Spicher*, 43 Fed. Rep. 653, where it was held: 'That where it appears the petitioner is held under the judgment of a state court of competent jurisdiction before this court should grant him a discharge it should be made to appear that the illegality of his detention is beyond fair question, and in all cases where the pivotal point has not been finally decided by the supreme court, but still remains a debatable question, the circuit court should not discharge the prisoner. * * * In such cases the Federal question can be readily presented to the supreme court, and, as there exists this plain and proper remedy, it should be followed.'

"The above decisions which seem to all relate to the States, apply with equal force to the Territories.

"See *Shute* vs. *Keyser*, 149 U. S. 649, where it held: 'An appeal or writ of error lies to this court (the Supreme Court of the United States) from the judgments or decrees of the supreme courts of the territories, except in cases where the judgments of the Circuit Courts of Appeal are made final.'

"See also *Aztec Mining Co.* vs. *Ripley*, 151 U. S. 79.

"For the reasons above given, the Court holds that it cannot assume jurisdiction of this case. But is there a proper

Federal question involved herein? If there is not, then there is an additional reason for not assuming jurisdiction, because it is settled that a writ of habeas corpus must be denied if it is apparent that the only result of its issue would be the remanding of the prisoner to custody. (*In re Boardman*, 169 U. S. 59.)

"The conditions which existed on these islands when annexed to the United States were unusual. This Territory had a civilization peculiar to itself, a government republican in form, with a written constitution, civil and penal statutes, courts of justice with established jurisdiction. It had public schools and other institutions of learning and laws enforcing compulsory education. It was not mere territory lying in mid-ocean, unused, but ready for man's use. It was a free, enlightened state possessing all the attributes of sovereignty, and when, with its consent, the islands were annexed by the United States, not only the lands but the people with their laws and customs were annexed; and by the well-established law of nations, these laws and customs remained in force until new laws were enacted for the government of the Territory. Section 19, Sutherland on Stat. Construc., page 19; Black on Constitutional Law, page 208; *American Ins. Co.* vs. *Canter*, 1 Pet. 541; *Cross* vs. *Harrison*, 16 How. 164-184.)

"These islands although originally a monarchy, had become a republic and the people were somewhat versed in the principles of self-government. So much was this so that Congress waited nearly two years before enacting a law for the government of the Territory. In the meantime no laws were enforced in the Territory of Hawaii but the laws of the Republic of Hawaii. The strong arm of the Federal government was not felt here. The former laws and judicial procedure remained and continued in force until the 30th day of April, 1900, when Congress passed the Enabling Act, which went into effect on the 14th day of June, 1900. This Act, though providing for a different form of government for the new Territory of Hawaii, continued in force many of the former laws of the islands, and prescribed especially: 'That all suits at law and in equity, prosecutions and judg-

ments, existing prior to the passage of this Act, shall continue to be as effectual as if this Act had not been passed. (Section 16 page 6.) "Act to Provide a Government for the Territory of Hawaii."' * * *

* * * * * * * * * * *

"Section 3, Article 6, of the Constitution of the Republic of Hawaii, authorized the legislature to fix the number of jurors required to agree on a verdict in 'offenses less than felonies.'

"In pursuance of this constitutional provision there was enacted by the legislature of the Republic of Hawaii (section 1345, Civil Laws) a law providing that 'no jury, for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve.' * * *

* * * * * * * * * * *

"As before stated, Section 83 of the Act of Congress for the government of the Territory of Hawaii, in part reads as follows: 'That the laws of Hawaii relative to the judicial department including civil and criminal procedure * * * are continued in force, subject to modification by Congress, or the legislature. * * * No person shall be convicted in any criminal case except by unanimous verdict of the jury.'

"One of the amendments of the Enabling Act was to repeal the law authorizing less than unanimous verdicts in criminal cases. But this repealing clause only took effect when the Enabling Act became a law, to-wit: June 14th, 1900, while this petitioner was convicted May 16th, 1900.

"It was held in the case of *Maxwell* vs. *Dow*, 176 U. S. 581, that: 'Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a Grand Jury, are proper to be determined by the citizens of each state for themselves, and do not come within the Four-

teenth Amendment to the Constitution so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure, and to have the same kind of trial, and the equal protection of the laws is secured to them.'

"The court finds that petitioner's remedy is by writ of error from the Supreme Court of the United States; and * * * * * * * * * * * * * *

"That a verdict of nine out of twelve jurors was authorized by the law of Hawaii, which law in respect to this feature, was not repealed until June 14, 1900, and after the trial of this case.

"It appearing that no Federal question is presented for the consideration of this court, it is without jurisdiction to entertain the petition for the writ of habeas corpus.

"Let the petitioner be remanded."

Extension of the Fifth and Sixth Amendments.

"That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone, was decided more than a half century ago, and that decision has been steadily adhered to since." *Ex parte Spies*, 123 U. S. 131 (1887), citing: *Barron* vs. *Baltimore*, 32 U. S. 7 Pet. 243, 247; *Livingston* vs. *Moore*, *Id.*, 469, 552; *Fox* vs. *Ohio*, 46 U. S. 5 How. 410, 434; *Smith* vs. *Maryland*, 59 U. S. 18 How. 71, 76; *Withers* vs. *Buckley*, 61 U. S. 20 How. 84, 91; *Permoar* vs. *Commonwealth*, 72 U. S. 5 Wall. 475, 479; *Twitchell* vs. *Commonwealth*, 74 U. S. 7 Wall. 321, 325; *The Justices* vs. *Murray*, 76 U. S. 9 Wall. 274, 278; *Edwards* vs. *Elliott*, 88 U. S. 21 Wall. 532, 557; *Walker* vs. *Sauvinet*, 92 U. S. 90; *U. S.* vs. *Cruikshank*, *Id.* 542, 552; *Pearson* vs. *Yewdall*, 95 U. S. 294, 296; *Davidson* vs. *New Orleans*, 96 U. S. 97, 101; *Kelly* vs. *Pittsburg*, 104 U. S. 79; *Presser* vs. *Illinois*, 116 U. S. 252, 265.

The status of the Hawaiian Islands with reference to the Fifth and Sixth Amendments, during the period in question, now comes before this court for the first time. The islands were not one of the United States. They were not an organized Territory of the United States. They were not, like Porto Rico and the Philippines, an acquisition from another nation by conquest, purchase or otherwise, of a portion of its domain. They were an independent nation, surrendering their sovereignty and their national property and for an indefinite period awaiting such form of government as Congress might give them. There is no parallel case in the history of the United States, probably not in the history of the world.

They had wholesome laws, an enlightened system of jurisprudence, industries, commerce, wealth, civilization, progress. These conditions were not of recent origin. Life and property had been comparatively secure for more than a hundred years. Compulsory education and constitutional government had existed for nearly sixty years.

It was by no means certain what form of government would be provided for them. The United States was then acquiring huge possessions in the tropics, inhabited by people, for the most part, incapable of self-government. The opinion was widespread that colonies would be created, and that the Hawaiian Islands might be one of them.

The annexation was by contract. The understanding and intentions of the parties are material. If it be urged that an extra session of the legislature might have been called to establish a grand jury system, the answer is irresistible, that such action was within the control of the President of the United States, that it would have involved long delay, and that the result would have been doubtful.

The following order, under date of May 13th, 1899, was received on the 1st day of June, 1899:

"By the President of the United States,

"Executive Order.

"In the exercise of the power conferred upon him by the Joint Resolution of Congress, approved by the President on July 7, 1898, entitled 'Joint Resolution to provide for Annexing the Hawaiian Islands to the United States,' the President of the United States hereby directs that the General Election provided for by the Constitution of the Republic of Hawaii to be held on the last Wednesday in September next, shall not be held. All elective officers whose terms of office shall expire before appropriate legislation shall have been enacted by the Congress of the United States, shall be continued in their offices at the pleasure of the President of the United States.

"In witness whereof, I have caused the seal of the United States to be hereunto affixed.

"Washington, May 13th, 1899.

"WILLIAM MCKINLEY.

"By the President,

"JOHN HAY, Secretary of State."

The foregoing order plainly indicates that the Federal administration, as well as the local administration and the Hawaiian Supreme Court, understood that the established functions of civil government for the repression of crime were still in operation; in other words, that the Fifth Amendment had not been extended.

The historical events culminating August 12th, 1898, further indicate the understanding and intentions of the contracting parties. Article 32 of the Constitution of the Republic of Hawaii provided that: "The President, with the approval of the cabinet, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of

America, subject to the ratification of the Senate." The treaty made in pursuance of this provision, ratified by the Hawaiian Senate September 10th, and by President Dole September 11th, 1897, provided that: "Article III.—Until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned. * * * The municipal legislation of the Hawaiian Islands not enacted for the fulfillment of the treaty so extinguished, and not inconsistent with this treaty nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The Newlands Resolution, so-called, ratified this treaty on the part of the United States.

The surrender of sovereignty on the part of the Republic of Hawaii, and its acceptance on the part of the United States, was in the following languge:

Minister Sewall said: "Mr. President, I present you a certified copy of a Joint Resolution of the Congress of the United States, approved by the President on July 7th, 1898, entitled 'Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States.' This Joint Resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii."

President Dole replied: "A treaty of political union having been made and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America, I, now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice

and friendship of the American people, yield up to you, as the representative of the government of the United States, the sovereignty and public property of the Hawaiian Islands."

Whereupon Minister Sewall said: "Mr. President: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government."

By direction of President Dole the Hawaiian flag was then lowered and the American flag was raised by direction of Minister Sewall.

The Newlands Resolution declared that, "until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands, shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned. The existing treaties of the Hawaiian Islands shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine. Until legislation shall be enacted extending United States custom laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged. * * * So long * * * as the existing government and the present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided for, said government

shall continue to pay the interest on said debt. * * * No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands. The President shall appoint five commissioners, * * * who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary and proper."

In his proclamation, President McKinley, after reciting the terms of the Joint Resolution, declared "that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies. * * * That the municipal legislation of Hawaii (subject to the exceptions set forth in the Joint Resolution) was to remain in force until the Congress of the United States should otherwise determine." The President ended his proclamation with the significant statement, "Under these various provisions the government of the islands will proceed without interruption." Yet it was impossible for the government of the islands to proceed without interruption, if the Fifth and Sixth Amendments to the Constitution of the United States were then extended.

The title of the Organic Act is significant of what Congress understood it was doing: "An Act to Provide a Government for the Territory of Hawaii." Section 83 of said Act is still more significant: "That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impanneling natives of Hawaii only, in civil and criminal cases specified in said

laws, are repealed, and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who can not understandingly speak, read, and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person shall be convicted in any criminal case except by unanimous verdict of the jury. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impanneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries." This section extends the Fifth and Sixth Amendments to the new Territory in language plainly indicating that Congress understood they had not been extended.

Annexation was by contract between two independent nations. The status of the Hawaiian Islands, pending the organization of the new government for them, must be controlled by the contract. The intention of the parties is the pole star to the interpretation of the contract. Such intention must be determined by their contemporaneous acts and conduct, and by the documentary evidence taken as a whole, not by a forced construction of a single phrase. If we study the contract as a whole in the light of the conditions that existed, is it not clear that all parties understood that law and order were to be maintained without interruption? Is it conceivable that annexation could have been consummated on any different understanding?

"We, the People of the United States * * * do ordain and establish this Constitution for the United States of America." No state can pass any valid act contrary to this Con-

stitution; yet it is settled that the first ten amendments do not apply to states; and that state constitutions and statutes dispensing with grand juries and unanimous verdicts "are not contrary to the Constitution of the United States." It is submitted that the reasoning of Chief Justice Marshall, in *Barron* vs. *Baltimore*, 7 Peters 243, by close analogy, applies to a civilized nation, which, pending the organization of a new government, voluntarily surrendered its old sovereignty.

"The Constitution of the United States was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States." The Constitution of the United States was ordained and established by the people of the United States for themselves, for their own government, and not for the government of a foreign nation pending its reorganization as a political subdivision of the United States.

"Each state established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated." The Hawaiian nation established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its government as its judgment dictated.

"The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred upon this government were to be exercised by itself, and the limitations on power, not expressed in general terms, are naturally, and we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." The people of the Hawaiian Islands framed such a government for the Hawaiian Islands as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred upon this government were to be exercised by itself,

and the limitations on power, not expressed in general terms, are naturally, and, we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes."

"If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the States." If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to a government recently a sovereign nation pending its reorganization as a state, territory, colony or otherwise, by the Congress of the United States.

"It is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." It is universally understood, it is a part of the history of the day, that annexation was not effected without great opposition in the United States, and might have failed but for the Spanish war. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched

over the interests of our country, deemed essential to union, were not adapted to conditions in the Hawaiian Islands, and the lack of accurate information regarding those conditions was universally admitted. In compliance with the sentiment thus generally expressed, to quiet fears thus extensively entertained, the majority in Congress refrained from making greater changes in the government and laws of the Republic of Hawaii than were absolutely essential to the transfer of sovereignty until a commission to be appointed by the President should investigate and report, and sufficient information should be obtained to make an intelligent creation of a new government possible. The amendments in question contained no expression indicating an intention to apply them to a foreign nation which has voluntarily surrendered its sovereignty to the United States, while it is awaiting a reorganization of its civil and political institutions. The court cannot so apply them.

This slight paraphrasing of the words of Chief Justice Marshall shows how strongly his reasoning applies to the conditions which existed between the surrender of sovereignty and the taking effect of the Organic Act. In the light of this reasoning, which has stood the test of sixty-eight years, can it be held that the words "nor contrary to the Constitution of the United States" had a meaning with reference to the Republic of Hawaii different from what they have with reference to the States of the American Union? In the light of the plain intention and understanding of the American Congress, the American Executive and the Hawaiian Government, as proved by documentary evidence, can it be held that what had been a sovereign nation was suddenly deprived of the power to protect itself from its own criminals, until Congress, at some future time, should give it a government?

In the decision appealed from, Judge Estee thus states the main question before the court: "Could a person in the

Territory of Hawaii, between the 7th day of July, 1898, and the 14th day of June, 1900, when the Act for the government of the Territory of Hawaii went into effect, be legally tried for an infamous crime without having been first indicted by a grand jury, as required by Article Fifth of the amendments to the Constitution of the United States, or convicted by less than an unanimous verdict of said jurors, as provided by Articles Sixth and Seventh of said amendments?" It is submitted that no such question was presented in court. There was at that time no government, no subdivision of the United States, known as the Territory of Hawaii. Physically, the Hawaiian Islands were territory, that is, land, in the lawful possession and control of the United States. Politically, they were not a territory of the United States as those words are used and universally understood in the United States. The civic powers which existed were, in the main, remnants of an independent nationality, held and exercised in the name of the Republic of Hawaii by the sanction of the United States, pending the creation of a new government. The question is not whether a person can legally be tried for an infamous crime without presentment by a grand jury, or be legally convicted thereof by a verdict less than unanimous, in a Territory of the United States,—but whether such trial and conviction were legal in the Republic of Hawaii prior to its becoming an organized Territory of the United States.

In the decision appealed from, the learned judge cites *Walker* vs. *New Mexico & S. P. R. R. Co.*, 165 U. S. 593, 596, to the effect that the statutes of the United States declare that no party "shall be deprived of the right of trial by jury in cases cognizable at the common law." "We deem it unnecessary," says the Supreme Court in this case, "to consider the contention of defendant in error, that the territorial courts are not the courts of the United States, and that the

Seventh Amendment is not operative in a territory; for by the Act of April 7th, 1874 (18 Statutes at large 27, Chap. 80), Congress, legislating for all the territories, declared that no party 'shall be deprived of the right of trial by jury in cases cognizable at common law'; and while this may not, in terms, extend all the provisions of the Seventh Amendment to the territories, it does secure all the rights of trial by jury as they existed at common law." The answer to this reference is not only that the Republic of Hawaii was not then a Territory of the United States, but also that the laws of the United States were not extended to the Hawaiian Islands by the Newands Resolution. They were not extended until the passage of the Organic Act, which provides: "Section 5.—That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere within the United States."

In the decision appealed from, the learned judge cites *Mormon Church* vs. *United States*, 136 U. S. 1, to the effect that: "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. * * * It would be absurd to hold that the United States had power to acquire territory and no power to govern it when acquired." The power is unquestionable, including, it is submitted, the power to leave the municipal laws of a newly acquired nation largely *in statu quo* until sufficient investigations can be made to intelligently change them.

In *ex parte Ah Oi*, 13 Haw. 553, Chief Justice Frear makes the following quotation from an opinion of the then Attorney-General of the United States: "The (Newlands)

Resolution is replete with indications that temporarily the relations of the two countries are to continue practically unchanged. Even some of Hawaii's relations with other countries are so to continue; its government is still to exist and collect its revenues; its laws are to remain in force, however, at variance with our laws, and the powers—civil, judicial and military—exercised by its officers are still to be exercised. It is, moreover, plainly apparent that Congress regards the establishment of an American government for and the extension of American laws to the islands as matters to be attended to in the future upon a consideration of the wide separation of the two countries in locality and character."

The Hawaiian courts during the period in question, were neither Federal nor Territorial. The judges held office by appointment from the President of the Republic of Hawaii. The President of the United States did not recommission them. He simply declared, pursuant to the Newlands Resolution, "That the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies."

Mr. Chief Justice Frear, delivering the opinion of the Court in *Ex parte Ah Oi*, 13 Haw. 534, after referring to the prior decisions of the Supreme Court of Hawaii, says: "The only new element introduced consists of the recent decisions of the Supreme Court of the United States in the so-called 'Insular Cases.' But these, as we read them, not only do not tend to show error in the view we have hitherto taken, but, so far as they go, support not only our former conclusion but also our former reasoning in a remarkable degree. * * * In the Insular Cases the only clauses of the Constitution that were involved were those which required that duties 'shall be

uniform throughout the United States' and other closely related clauses. * * * All nine members of the court were apparently of the opinion, * * * that after Porto Rico had been taken by conquest and until the ratification of the treaty of peace, the provision in regard to the uniformity of duties 'throughout the United States' had no application to that island, for though the island was then subject to the sovereignty of the United States and was to be regarded as a part of the United States by other nations, it was not a part of the United States within the meaning of that provision. But the court was divided in opinion as to the application of that provision to that island after the island had been ceded by the treaty, that is, during the period which we have held corresponded to the period in question in the present cases. A minority of four members of the court apparently were of the opinion that Porto Rico then became a part of the United States within the meaning of that provision. * * * Of the majority of five, four, namely, Justices Gray, Shiras, White and McKenna, took the view that Porto Rico remained foreign territory after the treaty, within the meaning of the constitutional provisions then under consideration, and that territory when acquired by the United States, though it became domestic for some purposes, remained foreign for other purposes, until it became incorporated by Act of Congress as an integral part of the United States. According to their view, the Constitution extended fully to newly acquired territory as soon as Congress showed expressly or by implication that the territory was to be deemed thenceforth fully incorporated as an integral part of the United States, but that until such time, the territory was to be regarded as in a transition state—partly domestic and partly foreign—during which period the Constitution was not applicable as a whole. As Mr. Justice Gray said: 'There must, of necessity, be a transi-

tion period.' The other member of the majority, Mr. Justice Brown, was of the opinion that territory became domestic as soon as acquired, but that the Constitution did not fully extend to it until extended by Act of Congress." * * *

* * * * * * * * * * * *

"In *Crossman* vs. *United States*, which was a case directly relating to Hawaii, the Court placed Hawaii during the period in question in the same category with Porto Rico, and, as we have seen in the cases relating to Porto Rico, it held that the Constitution had not become fully applicable there.

"In the cases relating to Porto Rico we find references to Hawaii pointing in the same direction. For instance, Mr. Justice Brown, in *Downes* vs. *Bidwell*, (at page 775) after reviewing the cases of Louisiana and Florida with reference to their transition periods, spoke of Hawaii in much the same way, as follows: 'So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.'

"Mr. Justice White also, speaking for Mr. Justice Shiras and Mr. Justice McKenna as well as for himself, in the same case, apparently took the view that Hawaii did not become incorporated as a part of the United States until the Organic Act took effect. He said (at page 794): 'By joint resolution of Congress the Hawaiian Islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the government of Hawaii was approved by which the Hawaiian Islands were given the status of an incorporated territory.'

"The majority of the court in the Insular Cases held that

even the Foraker Act did not incorporate Porto Rico as an integral part of the United States, comprehensive though that act was. That act, besides providing a tariff, established a government for Porto Rico, and a body politic to be called 'The People of Porto Rico,' with executive, legislative and judicial departments. It provided for a governor, secretary, attorney-general, treasurer, auditor, commissioner of the interior and commissioner of education, to be appointed by the President of the United States by and with the advice and consent of the Senate. It provided for a legislature to consist of an executive council and house of delegates, and provided for elections. It provided a judiciary much like that in Hawaii, consisting of the courts of Porto Rico and the District Court of the United States, and made provision for appeals and writs of error to the Supreme Court of the United States 'as from the Supreme Courts of the Territories,' and that 'such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied.' It provided that judicial process should run in the name of 'United States of America, ss: the President of the United States,' and that all officials authorized by the act should 'take an oath to support the Constitution of the United States.' It provided for the substitution of coins of the United States for those of Porto Rico, and for the nationalization of Porto Rican vessels, and that the statutory laws of the United States, not locally inapplicable, should, with certain exceptions, have the same force and effect in Porto Rico as in the United States. And yet the court held that Porto Rico had not been incorporated as a part of the United States so as to make the Constitution fully applicable to that island. How much more then would it seem that Hawaii did not become so incorporated by the Joint Resolution of annexation."

In *De Lima* vs. *Bidwell*, Mr. Justice McKenna, speaking for himself and Mr. Justice Shiras and Mr. Justice White, endorsed the following from the opinion of Mr. Justice Johnson in *American Insurance Co.* vs. *356 Bales of Cotton*, 1

Pet. 511: "It is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest), within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these, there can be no question that the sovereignty of the state or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the Crown of Spain. *And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession.*"

In the following lines Mr. Justice McKenna adds: "All the history and utterances of the past declare the same way. And how important those utterances and decisive of the present controversy! They were not the utterances of inattention and ignorance, and therefore to be discarded. They were the utterances of men (to borrow the thought of Benton) whose sacrifices made the Constitution possible, whose genius conceived and wrote it. Shall it be said that the farther time separates us from them the better we understand them,—better than they understood themselves? *American Ins. Co.* vs. *356 Bales of Cotton* came to this court and was argued by Mr. Webster. We may quote what he said. His views were more than those of an advocate. He expressed them elsewhere when a different, if not higher, duty demanded reflection, consideration, and sincerity. 'What is Florida?' he asked. 'It is no part of the United States. How can it

be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions.' And, responding to the argument, the court decided through Chief Justice Marshall that the judicial power of the United States, as declared by the Constitution, did not extend to Florida, and the title to 356 bales of cotton was held to pass by a sale under the order of a court, which consisted of a notary and five jurors, established by an act of the governor and council of Florida."

"*Geofroy* vs. *Riggs*, 133 U. S. 258," says Mr. Justice Brown, speaking for the majority of the court, in *Downes* vs. *Bidwell*, "may be considered as establishing the principle that, in dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations."

Section 1891, Revised Statutes of the United States, provides that: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect in all the *organized* territories, and in every territory hereafter *organized*, as elsewhere within the United States." The very words of this provision are incorporated in the Organic Act of the Territory of Hawaii, Section 5. Does this indicate that the Constitution *ex proprio vigore* came to the Hawaiian Islands with the flag or with the Organic Act?

Mr. Justice Brown, in delivering the opinion of the majority of the court in *Downes* vs. *Bidwell*, said: "It is doubtful

it Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States. * * *

* * * "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, (*Minor* vs. *Happersett*, 21 Wall. 162,) and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence and some of which have already been held by the States to be unnecessary to the proper protection of individuals. * * *

* * * "Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what

Chief Justice Marshall called the American Empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. *We decline to hold that there is anything in the Constitution to forbid such action.*"

Upon this point Mr. Justice White, in delivering his separate opinion in this case, says: "It is insisted, however, conceding the right of the government of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. This, however, is but to admit the power to acquire and immediately to deny its beneficial existence."

As the foregoing paragraphs indicate, certain provisions of the Constitution of the United States undoubtedly go with the flag, at least, if the occupation is not merely temporary, incident to an aggressive war. Such, for example, is the Thirteenth Amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction.*"

If the Constitution of the Republic of Hawaii had not de-

clared that: "Involuntary servitude, except for crime, is forever prohibited in this Republic: whenever a slave shall enter the territory of this Republic, he shall be free": if slavery had existed in Hawaii at the time of the change of sovereignty, the Thirteenth Amendment would have abolished it, without waiting for the passage of a congressional act or an extension of the Constitution of the United States as a whole. "Or any place subject to their jurisdiction" are not meaningless words.

Article VI. of the Constitution of the United States provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Yet, although the Constitution of the United States is the supreme law of the land in every state, it is settled beyond controversy that the Fifth and Sixth Amendments do not apply to states. It is respectfully submitted that, in the absence of congressional legislation directly or impliedly extending these Amendments, the like reasons apply with even greater force to a civilized nation which surrenders its sovereignty to the United States, and has nothing but its old legal machinery for protecting itself from anarchy until Congress shall provide a new government.

EDMUND P. DOLE,
Attorney-General of the Territory of Hawaii.

J. K. RICHARDS.

Solicitor General.

No. 592.

APR 11 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Atty. Gen.l (Richards)
Supt. (argt.)

In the Supreme Court

OF THE

UNITED STATES

Filed April 11, 1902.

In the Matter of the Application of Osaki Mankichi for a Writ of Habeas Corpus.

Appeal of the Territory of Hawaii from the District Court of the United States in and for Said Territory.

ARGUMENT FOR APPELLANT.

BY

EDMUND P. DOLE

Attorney-General of the Territory of Hawaii.

HONOLULU:
HAWAIIAN GAZETTE PRINT
1902

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

APPEAL OF THE TERRITORY OF HAWAII FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID TERRITORY.

ARGUMENT FOR APPELLANT.

MAY IT PLEASE THE COURT:

The President of the United States having requested Governor Dole's presence in Washington, and Land Commissioner Boyd being still in Washington, Secretary Cooper, who will be Acting Governor during Mr. Dole's absence, has requested me to remain at my post in Honolulu. This compels me, at short notice, to submit in the form of a printed argument the substance of what I had intended to urge orally before this court.

JURISDICTION OF APPEAL.

The appeal to this court is taken under the provision: "That appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue; * * * In any case that involves the construction or application of the Constitution of the United States." 26 U. S. 827, Sec. 5; as amended, 29 U. S. Stats. 492.

The United States District Court for the Territory of Hawaii is a legislative, not a constitutional, court. The provision of the Organic Act of the territory relating to appeals therefrom, in any case involving the application or construction of the Constitution of the United States, has not yet been judicially construed. Our Organic Act, both in this respect and as a whole, is so different from the Act of May 17th, 1884, providing a civil government for Alaska, and the United States District Court for the Territory of Hawaii is organized so differently from the United States District Court for the Territory of Alaska, that the Coquitlam Case, 163 U. S., 346, sheds little, if any, light upon the question of procedure in this case.

All parties interested are extremely anxious that the issue of constitutional law involved in this case may be settled by this court as promptly as possible, uncomplicated by any question of how it comes before this court. The counsel upon both sides, feeling that there might be a possible doubt in regard to the validity of an appeal direct to the supreme court, have signed a stipulation as follows:

"IN THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES OF AMERICA IN AND FOR THE NINTH JUDICIAL CIRCUIT.

"IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

STIPULATION.

"An appeal having already been taken and allowed in the above entitled case from the decision of the United States District Court in and for the Territory of Hawaii, to the Supreme Court of the United States, which appeal, now pending before said supreme court, has been set for argument on the 14th day of April, 1902; and a doubt having arisen whether such appeal lies directly to the Supreme Court of the United States, or directly to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and from thence to the Supreme Court of the United States; and both the said Osaki Mankichi and the Territory of Hawaii being desirous that the issues of constitutional law involved in said appeal should be decided by the Supreme Court of the United States, uncomplicated by questions of procedure, and as promptly as possible, Now, Therefore, It is Hereby Stipulated and Agreed that the appeal herein may immediately, without hearing, be certified by this court to the Supreme Court of the United States; and the parties hereto respectfully pray this honorable court that this appeal may be so certified.

"Dated at Honolulu, Island of Oahu, Territory of Hawaii, this 28th day of February, 1902.

"TERRITORY OF HAWAII,
"By E. P. DOLE,
"Attorney-General.

"OSAKI MANKICHI,
"By GEO. A. DAVIS,
"F. M. BROOKS,
"His Attorneys."

Pursuant to the above stipulation, an appeal was duly taken from the United States District Court for the Territory of Hawaii to the Circuit Court of Appeals, Ninth Judicial Circuit, which appeal, I presume, has been certified to this court.

The issue of constitutional law involved in this case is, therefore, before this court by both of the possible routes, and the question which is the proper route is eliminated.

Jurisdiction of the United States District Court.

My first proposition is that the Judge of the United States District Court of Hawaii erred in assuming jurisdiction to pass upon a question of constitutional law which had already been decided by the Supreme Court of the Territory.

I shall submit this branch of the case without attempt at argument. I do not see how it is possible to present it more clearly or more strongly than Judge Estee himself has done in the matter of the habeas corpus of William Marshall. I have quoted at length from this decision in my brief. The cases are cited and extracts given.

The Constitutional Issue.

While I believe that Judge Estee exceeded his jurisdiction, I shall be greatly disappointed, and the counsel upon the other side will be greatly disappointed, if the decision of this august tribunal turns upon this question. The ghosts of the transition theory and the ghosts of the anti-transition theory have haunted the Hawaiian courts, federal or territorial, for nearly four years. They will not down except at the mandate of this, the highest court in the land. Inferior territorial judges have declared from the bench that the decisions of the supreme court of the territory are not law, and have defied them, proceeding as if such decisions had never been rendered. The supreme court cannot agree with itself, and a majority of its members hold to one theory, while the United States District Court of the territory, overruling itself, now holds exactly the contrary theory. For about two years these courts

have played battle-door and shuttle-cock with nearly every felon in the territory convicted between the twelfth day of August, 1898, and the fourteenth day of June, 1900. Under these conditions, a prompt and decorous administration of justice has been impossible. It will be impossible until this grave constitutional question, in regard to which there is such an honest and irreconcilable difference of opinion, is settled. All parties in interest wish that Judge Estee's error—if he made an error in assuming jurisdiction—shall not stand in the way of an early and final adjudication of the constitutional question involved. Upon such adjudication depends the validity or nullity of every conviction of felony obtained in Hawaiian courts for a period of about two years.

The Insular Cases—to which I shall refer from time to time, and more fully later on—and the elaborate researches of counsel engaged in them, shed light upon this question; but the question itself now comes before this court for the first time. It is, I believe, absolutely without precedent in jurisprudence, because the same conditions have never before existed in history. This is, I believe, the first instance in the history of the world where an independent and civilized nation has voluntarily surrendered its national sovereignty and public property to a great and friendly power, awaiting for a period of nearly two years such form of government as might ultimately be given it.

The Territory of Hawaii does not ask this august tribunal for favors. It is the province of this court to dispense justice and law, not favor. The territory does not ask that the Constitution of the United States be set aside, or perverted, or strained, in behalf of the people of Hawaii. The territory simply asks that its broad, eternal principles of justice and common sense, interpreted in the light of such adjudicated cases as exist, may be applied to new conditions.

The first ten amendments to the Constitution of the United States are limitations of Federal power. They do not apply to states. This doctrine was established by Chief Justice Marshall almost ninety years ago. The meat of *Barron v. Baltimore*, like that in many another great opinion, is compressed in a few sentences. What is it? Simply that states have all the powers they have not given away, while territories, in the organic sense, have only the powers given them.

The severing of the ties of the thirteen original colonies with the mother country, if there had been nothing more, would have made them thirteen independent nations. By forming a confederacy, they parted with a portion of their sovereignty. What they did not part with they kept. In forming a more perfect union, they parted with other powers. What they did not part with they kept. Chief Justice Marshall interpreted the constitution in the light of the facts and conditions that gave it birth and of the manifest intentions of its framers. His opinion is great—and, like most great things, is simple.

In this connection I wish to call the court's attention to one other settled principle. Although a territory, in the organic sense, has only such powers as Congress gives it, Congress can give it statehood, and in so doing makes it co-equal with its thirteen original sisters. Massachusetts, an original colony, has the powers she did not give away. California, a created state, has the powers that were given her, in all respects equal to those of Massachusetts.

Congress cannot authorize a federal court to try any person for a capital or otherwise infamous crime except upon presentment by a grand jury; or to sentence any person for such crime except upon the unanimous verdict of a petty jury. Yet Congress, in creating a state, gives it absolute power to abolish the whole jury system in its own courts.

It seems to me as plain as plainness that if Congress can give this power to a state, it can, pursuant to treaty obligations, refrain from taking it away from a sovereign nation surrendering its sovereignty—at least for such time, pending the organization of a new government, as may be indispensable for the protection of life and property and the maintenance of law and order.

Before commenting upon the terms of the contract between these two nations, I wish, with the court's permission, to quote the material portions of the documents which embody it.

"The President (of the Republic of Hawaii), with the approval of the cabinet, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of America, subject to the ratification of the Senate." Article 32 of the Constitution of the Republic of Hawaii.

The treaty made in pursuance of this provision, ratified by the Hawaiian Senate September 10th, and by President Dole September 11th, 1897, provided that: "Article III. Until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned. * * * The municipal legislation of the Hawaiian Islands not enacted for the fulfillment of the treaty so extinguished, and not inconsistent with this treaty nor contrary to the Constitution of the United States nor to any exising treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

The Newlands Resolution declared that, "until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands, shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned. The existing treaties of the Hawaiian Islands shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine. Until legislation shall be enacted extending United States custom laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged. * * * So long * * * as the existing government and the present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided for, said government shall continue to pay the interest on said debt. * * * No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands. The President shall appoint five commissioners, * * * who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary and proper."

The surrender of sovereignty on the part of the Republic of Hawaii, and its acceptance on the part of the United States, was in the following language:

Minister Sewall said: "Mr. President, I present you a certified copy of a Joint Resolution of the Congress of the United States, approved by the President on July 7th, 1898, entitled 'Joint Resolution to Provide for Annexing the Ha-

waiian Islands to the United States.' This Joint Resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii."

President Dole replied: "A treaty of political union having been made and the occasion formally consented to by the Republic of Hawaii having been accepted by the United States of America, I, now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship of the American people, yield up to you, as the representative of the government of the United States, the sovereignty and public property of the Hawaiian Islands."

Whereupon Minister Sewall said: "Mr. President: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government."

By direction of President Dole the Hawaiian flag was then lowered and the American flag was raised by direction of Minister Sewall.

In his proclamation, President McKinley, after reciting the terms of the Joint Resolution, declared "that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies. * * * That the municipal legislation of Hawaii (subject to the exceptions set forth in the Joint Resolution) was to remain in force until the Congress of the United States should otherwise determine." The President ended his proclamation with the significant statement, "Under these various provisions the government of the islands will proceed without interruption."

The United States was a nation of seventy or eighty millions of people. The Republic of Hawaii was a nation of one hundred and forty thousand. By international law, they were equally high, contracting sovereign powers: but there was no

equality of physical strength. The words of President Dole were strikingly appropriate to the question before this Court: "With full confidence in the honor, justice and friendship of the American people." We had "full confidence in the honor, justice and friendship of the American people," and believed they were leaving us the right to protect our lives and property, and the lives and honor of our wives and children, under the laws we had, until new laws should be given us. We believed that we had safe-guarded this right in the treaty which we made, so plainly and so securely that there could be no occasion to come before this, the highest tribunal in the land, asking that the plain language of the treaty should be interpreted in conformity with elemental justice.

We ask nothing but such a fair and reasonable construction of our treaty as is consistent with the Constitution of the United States.

There is no question of conquest in this case. It was a voluntary treaty, entered into for the benefit of both parties; and, although people on the Atlantic Coast may not yet realize it, quite as much for the benefit of the great republic as for that of the little one. As it was purely a matter of treaty, of contract, it follows that what we did not concede to the United States, the United States did not get.

We ceded—I am quoting from the Newlands Resolution—"absolutely and without reserve to the United States of America, all rights of sovereignty."

What does this mean? It means that we gave Congress the right to make any laws for us, and impose any form of government upon us, permitted by the Constitution of the United States, or that may hereafter be permitted by an amended Constitution of the United States. It means that, having "full confidence in the honor, justice and friendship of the

American people," and retaining neither voice nor vote, we surrendered our future destinies to them, in trust for their good and for ours.

What did we retain? We retained the municipal legislation of the Hawaiian Islands, not contrary to extinguished treaties, nor inconsistent with the Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States—until the Congress of the United States should otherwise determine.

In commenting upon these treaty rights, Mr. McKinley, in his proclamation, said: "Under these various provisions the government of the islands will proceed without interruption."

I feel sure that this court will interpret the documentary evidence, not by a narrow construction of a single phrase, but as a whole, in the light of historical facts and in the broad and catholic spirit of the Constitution of the United States. Interpreted in such a spirit, what is the meaning of this transaction? Simply that the Republic of Hawaii, having "full confidence in the honor, justice and friendship of the American people," surrendered its future destinies to the United States, absolutely and without reserve; and, in the meantime, until Congress should have opportunity to investigate, weigh, consider and act, retained its existing institutions and form of government, its municipal legislation for the protection of life and property and other local purposes.

In the interpretation of a contract, the intention of the parties is the pole star. In case of doubtful or ambiguous expression, the vital question is, what did they mean by what they said? What is the fair interpretation of what they said, viewed in the light of surrounding circumstances, their acts at the time, and their subsequent conduct?

In this case I see no room for an intelligent difference of opinion in regard to their intentions. For international pur-

poses they understood that, with annexation, the Republic of Hawaii had ceased to exist, as the Kingdom of Prussia ceased to exist in an international sense when Bismarck created the German Empire. For local purposes it existed until it was replaced by the organized Territory of Hawaii. In all official communications between the government at Washington and the government at Honolulu, Mr. Dole was still addressed as the President of the Republic of Hawaii; he drew his salary from the Hawaiian treasury, pursuant to Hawaiian law, as President of the Republic of Hawaii. The powers of the Minister of Foreign Affairs, so far as they related to foreign affairs, necessarily ceased; but he retained his title and performed the local duties attached to his office. No other change was made in the duties, titles or personnel of Hawaiian officials. When vacancies occurred, they were filled in the same manner as when Hawaii was an independent nation. The American flag floated over public buildings. The American Minister became Presidential Agent. The other foreign diplomats became resident consuls. This was substantially all the apparent change. The Republic of Hawaii became a dependent government, retaining many of the functions usually exercised only by independent governments—its tariff system, its postal system, its consular system. United States consuls continued to discharge their duties in Honolulu and Hilo. Letter postage to the United States was five cents instead of two cents. Imports from the United States paid Hawaiian duties. Exports to the United States paid Federal duties. It is foreign to this case whether these provisions of the Resolution were valid or invalid, if they shed light upon the intent of the contracting parties acting within their constitutional power. Could anything more conclusively prove the intention and understanding of Congress, of the President of the United States, and of the Government of the Republic of Ha-

waii, that the Constitution of the United States was not to be extended in toto until further legislation? As Mr. McKinley said, the government of the islands was to proceed without interruption.

Mr. McKinley appointed Senator Cullom, Senator Morgan, Representative Hitt, President Dole and Chief Justice Frear commissioners pursuant to the Newlands Resolution. Upon their arrival in Honolulu, the American members of this commission requested the views of the Hawaiian government in regard to its political status, pending reorganization under such form of government as Congress might subsequently see fit to give it. Mr. W. O. Smith, then Attorney-General, requested me to write an opinion. The opinion which I then wrote was, in substance, my position before this court. It was accepted as the opinion of the Hawaiian government, unanimously accepted by the President and Cabinet of the Republic of Hawaii, and it met the views of the American members of the commission. It was unanimously sustained by the Supreme Court of the Republic of Hawaii. Judged by his official acts and correspondence, which are matters of record, the theory of the Hawaiian government, in this respect, had Mr. McKinley's approval from first to last.

The construction which parties put upon a contract by their acts, is the strongest possible evidence of how they understand it. To quote in substance the language of Mr. Justice Brown, in *De Lima v. Bidwell*, the understanding and acts of the two governments "are entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction be erroneous."

A statute is not contrary to the Constitution of the United States if no provision of that Constitution applies. Trial by ordeal in darkest Africa is not contrary to the Constitution of

the United States, because no provision of the Constitution applies there. Trial in a state court for a capital or otherwise infamous offense, without presentment by a grand jury, is not contrary to the Constitution of the United States, because the Fifth Amendment does not apply to states. Sentence for such offense upon a verdict less than unanimous is not contrary to the Constitution of the United States, because the Sixth Amendment does not apply to states. These amendments do not apply to states or limit their power, because, as Chief Justice Marshall said, contemporaneous history shows that they were not intended to apply to states or limit their power. Portions of the Constitution apply to states and not to territories. Portions apply to territories and not to states. Portions to states and territories alike, and at least one provision, that relating to human slavery, applies to every foot of land within the dominion of the United States.

The Hawaiian Islands ceased to be an independent nation in 1898. They did not become an organized Territory of the United States until 1900. There was a transition period, unless, for a period of about two years, they were deprived of the legitimate protection of civilized government. They safeguarded against this calamity by treaty, made while they were a sovereign nation. It was one of the principal conditions in their surrender of sovereign rights. It was not an acceptance of such powers as Congress saw fit to give them. It was a retention of powers expressly reserved.

If this court applies the reasoning of the great John Marshall, in *Barron v. Baltimore*, to the treaty between the United States and the Republic of Hawaii, and to contemporaneous history, it must hold that the words "nor contrary to the Constitution of the United States" have no reference to the Fifth and Sixth Amendments; because, during the transition period, the Fifth and Sixth Amendments had no more

application to the Republic of Hawaii than they have to the State of Massachusetts or to the State of California.

It seems to me that history leading up to annexation, as well as the history of annexation itself, has a bearing upon the question which now comes before this court for the first time. For the court has before it a broad field, which must take into account existing conditions and historical facts.

The Hawaiian Islands were a clump of petty monarchies for unknown ages prior to their discovery by Captain Cook. A great man, as the world counts greatness, came to the front in the latter part of the eighteenth century and the half dozen kingdoms were hammered and fused into one. Kamehameha I. was Moi, God-King, and a dark-skinned barbarian. But he made life and property safe, as it never had been before. Indeed, for the past one hundred and seven years life and property have been safer in the Hawaiian Islands than in most parts of the civilized world. He promulgated wise edicts; he encouraged industries; he built up commerce; he negotiated treaties with the United States, with Great Britain, with Russia, and with China. He was recognized in Europe and America, not as a savage chief, but as the head of an independent nation.

His successor, Kamehameha II., who ascended the throne in 1819 and died in 1824, was received at the Court of St. James with royal honors.

More than sixty years ago Kamehameha III. gave his people a written constitution. According to ancient ideas he was supreme law maker, dispenser of life and death, a divine being sent by the gods to rule men for a short space, and then return to the gods from whence he came. As the old mele put it: "All men, all things that breathe, are the Moi's: the land is his: the sea is his: the bird of the air is his, and the dead

whale, cast up by the waves." More than sixty years ago Kamehameha III., heir to these traditions of divine right and absolute power, gave his people a written constitution, embodying the elemental principles of civil and religious liberty. It was not wrested from him as Magna Charta was wrested from King John; it was a voluntary and a royal gift.

An act of the first legislature, held sixty years ago, required every child in the Kingdom to learn to read and write. Compulsory education, for good or for evil, has been the law of the Hawaiian Islands ever since, and it has been generally enforced.

In 1848 came the great Mahele, by which Kamehameha III. set apart one-third of the land for the maintenance of the government and the dignity of the crown; one-third for the chiefs, and one-third for the common people. The royal patents issued pursuant to this great act are the source of land titles to the present day.

It is not presumptious, considering the conditions which surrounded him and the smallness of his stage, to class Kamehameha I. with the great men of history; and Kamehameha III., Kamehameha IV. and Kamehameha V. sincerely, and with such light as they had, sought their people's good. The dynasty which ruled the Hawaiian Islands for the first three-quarters of the nineteenth century will compare favorably with most dynasties of civilized lands. No doubt the great Kamehameha was largely influenced in his broad and far-seeing policy by John Young, an English sailor of great ability and common sense, who was premier for something like thirty years. No doubt the constitution and the great Mahale of Kamehameha III. were due to the influence of the missionaries. No doubt educated white men of high character were an important factor in shaping the reigns of Kamehameha IV. and Kamehameha V. Still, the fact remains, that in

these far-off Polynesian islands, for a period of towards a century, there was a native dynasty which was more humane and more just than the dynasties of Europe have usually been.

The principles of civil and religious liberty took such deep root under this remarkable line of kings, that Anglo-Saxon ideas and institutions continued to develop during the reigns of their successors. Constitutional government has been maintained for sixty years. It has never been stained by acts of cruelty, and if at times it has been corrupt, at times it has been exceptionally pure—even according to Anglo-Saxon standards. The higher courts in particular were clean, from their organization in the early forties until the organization of the Territory in 1900. As far as I have ever heard, every supreme court and every circuit court judge, with perhaps one exception, appointed during this long period had the reputation of being an honest man. The scandals which sometimes disgraced the executive and legislative departments of government, never extended to the higher judiciary as long as Hawaii was an independent nation. While some of these judges had but limited preparation for their high office, others were lawyers of ripe scholarship and distinguished ability. It is a significant fact that Judge Lynch has never held court in Hawaii. For nearly sixty years, the lawful tribunals had the confidence of the community.

At the time of annexation a great industry had grown up which furnished a considerable portion of the sugar used in the United States. Many lesser industries contributed to the business stability and prosperity of the islands. Commerce was in a most flourishing condition. There were houses that dealt with every part of the civilized world. The business honor of Honolulu merchants had become proverbial. The like may be said of the government. Never in the history of the country, either under the monarchy or under the repub-

lic, was a government bond or other obligation dishonored. Public improvements had made great progress. Many millions of dollars had been expended upon churches, schools, colleges, museums, hospitals, upon the institutions that uplift and humanize a people. Small and remote as these islands were, the evolution of more than a hundred years had made them a free, civilized, enlightened Christian republic, the only independent nation in the tropical world of anything like the same character and advancement. It was a nation which had demonstrated its capacity for self-government and its ability to take care of itself under most trying circumstances.

The United States has repeatedly enlarged its domains by conquest and by treaty. It annexed the Republic of Texas, taking it into the Union as one of the United States. But these acquisitions are not in point. The Republic of Hawaii surrendered independent nationality and waited nearly two years until Congress gave it a new government to take the place of its old one. This was by contract. It is inconceivable that either party to the contract intended that a rich, civilized and enlightened community should be left for an indefinite period, bound hand and foot, at the mercy of the criminal classes. Here was a little nation with a history, that, considering its recent beginnings in barbarism, can proudly challenge comparison with Massachusetts or Virginia or Ohio or California. Its relations with the United States had always been of the closest and most friendly character. The government of the United States is the government of a great and just people, a government utterly incapable of closing the courts even of a vanquished enemy, and leaving that enemy helpless to help itself, exposed to murder, lust and pillage. That the government of the United States should have intended to put a friendly and confiding people in that plight is beyond human belief. Such conduct would be a breach of

trust, without parallel in the atrocities committed by civilized nations. Such intention cannot be imputed. Such intention could not have entered into the contract and the intent controls. When the American people carry their flag to a foreign land, they do not smite down the institutions that maintain law, order, protection from crime. They uphold them. They must uphold them until there is opportunity to change them. The broad and catholic spirit of the Constitution of the United States demands it. Humanity demands it. The elemental law which God has put in men's hearts demands it, and civilized people cannot shut up the courts and put unoffending men, women and children at the mercy of cut-throats and robbers.

The Hawaiian Islands were not unorganized territory. They were not possessions acquired from a foreign power by conquest or by treaty. For about a hundred years they had been recognized as one of the sovereign nations of the earth. They were a civilized and progressive nation, and if community of religious ideas has any bearing upon international law, they were a Christian nation. The principle is the same whether their civilization was eighty years old, or fifteen hundred years old; whether they had one hundred and forty thousand citizens, or thirty millions. Suppose the United States, instead of annexing the Republic of Hawaii, had annexed the Republic of France: had done away with the old legal machinery, and, without supplying new, had prorogued the French legislative assembly, thereby depriving the French people of the power to do so, and had left France, for nearly two years, practically without law. The civilized world, with one voice, would have cried, Impossible!

If the Fifth Amendment to the Constitution of the United States came to the Hawaiian Islands with the flag, then for nearly two years the courts had no lawful authority to try any

one for crime; and what had been a sovereign nation was suddenly relegated to the natural rights of self-protection, which exist where there is no law. The grand jury system had never been adopted. Indictments based on the records of the committing magistrate were signed by the attorney-general, or his deputy, and the presiding Judge, as they are in several of the United States. The bi-ennial session of the legislature had recently come to an end. If a special session had been called to provide for summoning and paying grand jurors, there would have been a hiatus of months, and the result would have been problematical. Was a civilized community to be left without protection from criminals for three months, or even for one month? But the summoning of the legislature was within the control of the President of the United States, or was supposed to be so, and instead of sanctioning a special session, Mr. McKinley postponed the regular session of 1900; so that there was no session of the Hawaiian Legislature from 1898 until 1901. This shows that the government at Washington understood that Hawaiian courts had power to perform the necessary functions of courts. The proclamation of President McKinley, referring to the Newlands Resolution was to the same effect: "Under these various provisions the government of the islands will proceed without interruption."

The framers of the Constitution of the Republic of Hawaii were not hampered by State jealousies as were the framers of the Constitution of the United States. The Constitution of the United States had been in operation for more than a hundred years. The framers of the Constitution of the Republic of Hawaii had the advantage of careful study of the merits and defects of the Constitution of the United States as a working instrument, as well as a careful study of the unwritten Constitution of England, the written Constitution of the

French Republic, the most excellent Constitution of the Swiss Republic, and an intimate acquaintance with local conditions. Whether the grand jury system and unanimous verdicts were wise under the conditions which faced the makers of the Constitution of the United States, is one question. Whether such provisions were wise under the conditions which faced the makers of the Constitution of the Republic of Hawaii, is a very different question. At any rate, these provisions had never existed in the Hawaiian Islands.

Right here I wish to make what seems to me a material suggestion. The municipal legislation of the Hawaiian Islands required that native cases should be tried by native juries and foreign cases by foreign juries. With that provision in force, with the grand jury system and with the requirement that jurors should be citizens of the United States, in three, if not in four of the five judicial circuits, a sufficient number of foreign jurors to go round could not have been obtained by summoning the cradle and the grave, and a native jury would have been an impossibility. As it was, in three of the five circuits, intelligent and qualified white jurors were so few that the same men were compelled to serve term after term and year after year—and, under the law, they were not necessarily citizens of the republic.

The Constitution of the United States is supreme in every state in the Union. No state can make any constitutional or statutory enactment contrary to the Constitution of the United States. Yet, from the time of Chief Justice Marshall, it has been held that the Fifth and Sixth Amendments, requiring indictment by grand jury and conviction by unanimous verdict, do not apply to the states. Do not international good faith, justice, reason, common sense and common humanity demand a like construction of the Fifth and Sixth Amendments in dealing with a civilized nation, which has

surrendered its sovereignty and has nothing but the old machinery for maintaining law and order and protecting life and property, until a new government is organized?

During the period in question Hawaiian courts were neither federal nor territorial. Judges held commissions from the President of the Republic of Hawaii. A majority of them were citizens of the Republic of Hawaii; one or two were citizens of the United States; one was a British subject.

About sixty years ago, when Kamehameha III. gave his people a Constitution, a bright young foreign lawyer passing through Honolulu, was invited to remain, organize a judiciary department and be chief justice. He did so and filled the position with great credit until his death. This is but a single illustration. An isolated people, emerging from barbarism and eager to take a place among civilized nations, sought out competent white men to teach them and lead them. But it often happened that these white men were unwilling to renounce allegiance to the land of their birth and the protection of its flag. So there grew up and was sanctioned by constitutional and statutory provisions a system of denizenship, under which persons of foreign birth might hold the highest offices short of the crown or the presidency of the republic, without being citizens or voters. This system continued until the organization of the territory. Nothing is more foreign to American ideas than a British subject presiding over an American court. Yet a British subject was one of the ablest and most honored members of the Hawaiian judiciary at the time of annexation, and continued in office until the organization of the territory.

The same system applied to juries. Under the monarchy and under the republic, jurors were divided into native and foreign, foreign not necessarily by birth, but by ancestry. A typical foreign jury consisted of perhaps three or four men of

pure white blood, citizens of Hawaii by birth, and the remainder, Americans, Englishmen, Scotchmen and Germans, who, although they might have resided in the Islands the greater part of their lives, were not citizens. This system, like the system of appointment to office, was made necessary by the peculiar conditions alluded to. It resulted in getting white juries equal in sterling honesty, and superior in experience, to the best juries of rural New England, the representative white men of the Hawaiian Islands. Outside of Honolulu there was not sufficient material for juries of this high grade, if citizenship had been a requirement.

The mere fact of annexation did not make a British subject, holding a commission from the President of the Republic of Hawaii, an American judge. The mere fact of annexation did not make British and German subjects, sitting before that judge, American jurors. The system, under the conditions which gave it birth, was wise and necessary; but it was not American. It was inconsistent with the theory of American courts. There was no American court in the Hawaiian Islands, federal or territorial, until the Republic of Hawaii ceased to exist and Congress created the Territory of Hawaii. They were Hawaiian courts, and there was no authority of law for making them American until Congress gave it. Under the Newlands Resolution and the proclamation of the President of the United States, they were to proceed "without interruption."

The Republic of Hawaii surrendered its sovereignty to the United States pursuant to contract. The contract contemplated, and both parties perfectly understood, that the functions of civilized government were to continue "without interruption," and, as nearly as possible, on the old basis until a new government should be provided. The Hawaiian flag was lowered August 12th, 1898, and the American flag was

raised. This was symbolic livery of seizin, and nothing more. The tenant was left in possession. The Republic of Hawaii ceased to exist as a foreign nation. Its relations with foreign powers came to an end. It became, not a state, not a territory, but a possession, a dependent government authorized to conduct its local affairs substantially as before, until its needs could be ascertained and a new government organized. The acts of the parties to the contract, which put this interpretation on it, have passed into history.

I submit that there is not a phrase in the Newlands Resolution which extends the Constitution of the United States to the Hawaiian Islands, except such provisions thereof as go with the flag *ex proprio vigore*.

"Until legislation shall be enacted extending United States custom laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged." If the Newlands Resolution and the transfer of sovereignty made the Hawaiian Islands, not a mere possession, but an integral part of the United States, this provision violated Section 8 of Article I. of the Constitution of the United States, which declares that: "All duties, imports and excises shall be uniform throughout the United States." Yet it was a material part of the treaty between the two countries. It involved nearly half the revenue of the Republic of Hawaii. If this provision was beyond the constitutional power of Congress, one of the main considerations for the surrender of sovereignty failed, and the Republic of Hawaii was entitled to resume its independence.

"The existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged." This was a remnant of national sovereignty which was not taken away, or attempted to be taken away, until the

Organic Act went into effect. During the entire transition period the government of the United States recognized it as a binding obligation. It has passed into history.

The exclusion of Chinese,—"No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands,"—amounted to an emphatic declaration that the Republic of Hawaii was not to be an integral part of the United States until further legislation.

"Nor contrary to the Constitution of the United States." Congress cannot continue, authorize or validate any legislation contrary to the Constitution of the United States. Yet Congress can create a state from a territory; and the state can adopt a constitution, dispensing with grand and petty juries. Such state constitution would not be contrary to the Constitution of the United States because the first ten amendments do not apply. If the United States, within its own borders, can create a quasi sovereignty, to which its own constitutional provisions for grand and petty juries do not extend, how much more, in accepting a surrender of sovereignty by a foreign nation, can it leave it to the operation of its own jury system until its laws can be changed intelligently!

The United States, within its own confines, leaves Indian tribes free to make and administer their own laws, treating them as dependent nations. If Congress can do this, as the federal courts say it can, most certainly it could leave an enlightened republic in the Mid-Pacific the necessary functions of civilized government, until a new government could be provided.

The discussions of the Insular Cases by the eminent counsel engaged in them, and by this court, have covered an immense range of research. This great tribunal, aided by some of the best minds of the American bar, has critically and ex-

haustively studied the bearing of these cases. In reviewing them—if it becomes necessary to review them to ascertain their bearing upon this case—the court will certainly bear in mind Chief Justice Marshall's wise words—which, it seems to me, the learned judge of the United States District Court of Hawaii has failed to do—"that general expressions in every opinion are to be taken in connection with the case in which those expressions are used."

I have found nothing in these cases—either in the majority or in the minority opinions—which seems to me in conflict with the position I take before this court.

In *De Lima v. Bidwell*, Mr. Justice Brown, delivering the opinion of the majority of the court, begins with the statement: "This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a 'foreign country' *within the meaning of the tariff laws.*" The words "within the meaning of the tariff laws" limit the application of the case.

In the course of his opinion in this case, Mr. Justice Brown quotes and comments approvingly upon President Buchanan's statement that "the great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." A page further on, in this opinion, Mr. Justice Brown states the following as an established proposition: "The civil government established in California continued *from the necessities of the case* until Congress provided a territorial government."

In the dissenting opinion of Mr. Justice McKenna, Mr.

Justice Shiras and Mr. Justice White, Mr. Justice McKenna quotes Mr. Justice Johnson, in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, as follows: "'The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the Crown of Spain. *And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession.*' The italics are ours. All the history and utterances of the past declare the same way."

Both the majority and minority opinions in the De Lima case are in harmony with my claim, and, as far as they go, they sustain it, that the Fifth and Sixth Amendments to the Constitution of the United States were not extended to the Hawaiian Islands until the taking effect of the Organic Act.

In *Dooley v. United States*, Mr. Justice Brown, delivering the opinion of the majority of the court, closes as follows: "In our opinion, the authority of the President, as Commander-in-Chief, to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued *until Congress should constitutionally legislate upon the subject.*" The words "until Congress should constitutionally legislate upon the subject" eliminate from the decision every possible construction adverse to the position which I take before this Court.

On the other hand, Mr. Justice White, speaking for himself, for Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice McKenna, says: "The rule of the immediate bringing, by the self-operating force of a treaty, ceded territory inside of the line of the tariff laws of the United States, denies the existence of powers which the Constitution expressly bestows, over-

throws the authority conferred on Congress by the Constitution, and is impossible of execution. * * * * * * * * *

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* * * Suppose a treaty of cession which embraces territory producing in large quantities the articles upon which the existing tariff laws mainly rely for revenue to sustain the government. If, instantly, on the ratification of the treaty, before Congress can remodel or change the laws so as to provide for the support of the government, the articles stated coming into the United States from the country in question would be within the tariff line, and thereby entitled to free entry into the United States, what would become of the power of the House of Representatives and of the Congress upon the subject of revenue as provided in the Constitution? It may be said in answer to this suggestion that Congress could make the change, and whilst of course a brief interval of disaster would ensue, during which there would be no revenue, the country must suffer the consequences during such interval. But does this follow? Suppose the political state of the country should be such that there was a difference of opinion as to the policy to be embodied in a tariff law, analogous to that which existed when California was acquired from Mexico, where, in consequence of division on the subject of the slavery question between the different branches of Congress, it was impossible to enact legislation conferring a territorial government upon California, what would be the situation then? Look at it practically from another point of view. Certainly before revenue laws can be made operative in a district or country it is essential that the situation be taken into account for the purpose of establishing ports of entry, collection districts, and the necessary machinery to enforce them. Of course, it is patent, that such investigations cannot be made prior to acquisition. But, as the laws immediately extend, without action of Congress, as the result of acquisition, it must follow that they extend, although none of the means and instrumentalities for their successful enforcement can possibly be devised until the acquisition is com-

pleted. This must be, unless it be held that there is power in the government of the United States to enter a foreign country, examine its situation, and enact legislation for it before it has passed under the sovereignty of the United States. From the point of view of the United States, then, it seems to me that the doctrine of the immediate placing of the tariff laws outside the line of newly acquired territory, however extreme may be the opinion entertained of the doctrine of immediate incorporation, is inadmissible and in conflict with the Constitution. * * * * * * * * * * * * *

* * * All these suggestions, however, it is argued, but refer to expediency, and are entitled to no weight as against the theory that, under the Constitution, the tariff laws of the United States took effect of their own force immediately upon the cession. But this is fallacious. For, if it be demonstrated that a particular result cannot be accomplished without destroying the revenue power conferred upon Congress by the Constitution, and without annihilating the conceded authority of the government in other respects, such demonstration shows the unsoundness of the argument which magnifies the results flowing from the exercise by the treaty-making power of its authority to acquire, to the detriment and destruction of that balanced and limited government which the Constitution called into being."

In *Downes v. Bidwell*, Mr. Justice Brown, delivering the opinion of the majority of the court, said: "Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. Nothwithstanding its duty to 'guarantee to every state in this Union a republican form of government' (Art. 4, Sec. 4), by which we understand, according to the definition of Webster, 'a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them,' Congress did not hesitate, in the original organization of the Territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Mich-

igan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habaes corpus, as well as other privileges of the bill of rights.

"We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the right, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that 'the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible * * * to the enjoyment of all the rights, advantages, and immunities of citizens of the United States'; in the case of Mexico, that they should 'be incorporated into the Union, and be admitted at the proper time

(to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States'; in the case of Alaska, that the inhabitants who remained three years, 'with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights', etc.; and in the case of Porto Rico and the Philippines, 'that the civil rights and political status of the native inhabitants * * * shall be determined by Congress'. In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto. * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals." * * *

"Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire, not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question

whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafer acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is that if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions.

"There is a provision that 'new States may be admitted by the Congress into this Union'. These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new Territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the

government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. Cooley, Const. Lim., Secs. 81-85. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 691, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495.

"Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about condition which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action."

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmation, said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred

from one nation or sovereign to another the municipal laws of the country—that is, laws which are intended for the protection of private rights—continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force, without any declaration to that effect; and the laws of the country on other subjects would necessarily be superceded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until by direct action of the new government, they are altered or repealed. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 542, 7 L. ed. 255; Halleck, International Law, Chap. 34, Sec. 14.' * *

"The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have conceded, whether the island be incorporated or not, the applicable provisions of the Constitution are there in force. *

* * * * * * * * * * *

"The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a do-

mestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession."

Mr. Justice Gray, concurring, said: "If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government which is not subject to all the restrictions of the Constitution."

I have been greatly impressed with the ability of the Solicitor-General's argument in these cases. I wish to recall a paragraph or two to the attention of the court:

"'Protection to life, liberty, and property rests primarily with the States', as Chief Justice Fuller said in *In re Kemmler* (136 U. S., 438, 448). 'The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws,' said Mr. Justice Catron in *Permoli v. First Municipality* (3 How., 589, 609). The Constitution forbids the states to pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or to grant any title of nobility, and the fourteenth amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; but outside the range of these limitations the people of the state, through its constitution and laws, are supreme. They can define treason against the state as they see fit; they can limit the freedom of speech and of the press; they can restrict the bearing of arms; they can provide for the quartering of troops; they can regulate the right of search and of arrest; they can provide for the trial of capital or otherwise infamous crimes upon information and without indictment, and without a jury, and they have done so. They can do away with the trial of civil suits by a jury. And they may do many other things which I need not enumerate.

"The right of the people of the states to change their laws and system of procedure so as to make them conform to changed views of administration, or the exigencies of their

social life, has been sustained. If the constitutional guarantees relating to indictment by a grand jury and trial by a petit jury are not fundamental in character, and therefore do not tie the hands of the inhabitants of a territory when organizing a state, why should they tie the hands of the President and Congress in preserving order and protecting life and property in our new possessions?

"It is a strange contention that as soon as the treaty went into effect the power of the President and Congress to preserve order in the new possessions ceased. There were no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law, and yet, if the limitations intended for the states at once of their own force applied in these new possessions, crime could be punished in no other way. The Constitution which gave the United States the power to acquire territory by treaty, and imposed upon Congress the duty of disposing of and governing it, did not leave the National Government helpless by demanding impossibilities. Until the progress of the people of these Territories will permit of the organization of courts and juries after our system, these guarantees must be held inoperative, or the preservation of peace and order and the protection of life and property be abandoned. The situation resembles that discussed in the case of *In re Ross* (140 U. S., 453), where a conviction of murder by a consular court in Japan, acting without a jury and upon information, was sustained, Mr. Justice Field saying (p. 464): 'And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution'.

"In dealing with our new possessions, due regard for their traditions should be shown. They have been accustomed to the jurisprudence of the civil law. It would be the height of tyranny and oppression to compel them to abandon it without good cause. In providing them a system of local government,

should we not keep in mind what Mr. Justice Brown, speaking for the court, said in the recent case of *Holden v. Hardy* (169 U. S., 366, 389): 'In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had no previous acquaintance or sympathy."

I find nothing in a single opinion given in the Insular Cases conflicting with what it seems to me must be the law of the case now before this court. There can be no doubt about the intention of the parties. The Republic of Hawaii would never voluntarily have surrendered its sovereignty upon any understanding that the ordinary functions of its courts should cease for an indefinite period, and that meantime it should be without protection from the criminal classes. Neither the United States nor any other civilized government would ask or desire such a concession. It was what both parties supposed they had provided against. Mr. McKinley said, "Under these various provisions the government of the islands will proceed without interruption." If the parties intended this, as they certainly did, and if justice and national good faith require that their intentions should be executed, the language of Mr. Justice Brown in *De Lima v. Bidwell* is in point: "If there is an admitted wrong the courts will look far to supply an adequate remedy."

Although, as I believe, the Insular Decisions, as far as they go, sustain the contention of the Territory of Hawaii, it does not rest its case upon them alone. Its position is unique in

history and without precedent in jurisprudence in this, that, while an independent nation, it stipulated, subject to certain exceptions, that its form of government and municipal legislation should continue unchanged until Congress should provide a new government. This was a reservation of power, bringing it directly within the principle and reasoning of *Barron v. Baltimore*. Representing the Territory of Hawaii, I stand on its treaty rights.

For fifteen centuries men who claimed to be followers of Christ spent their time in constructing elaborate systems of theology and in persecuting those who dissented. But the Master said, love God and your neighbor. That is all there is to it. Under that divine searchlight these finely spun scholastic religions become empty words. The analogy holds with legal principles. Scholars, case lawyers, elaborate, elaborate and elaborate until everybody is befogged. A great mind, like the mind of John Marshall, evolves a few sentences and truth breaks through the fog and shines like the sun in heaven. The decision of Chief Justice Marshall in *Barron v. Baltimore* is pure, terse reasoning applied to well-known historical facts. I may be mistaken, but it does seem to me that if this court applies the same reasoning to similar historical facts—even stronger, because here the understanding of the parties is plainly expressed in a solemn treaty—if the court does this, the Territory of Hawaii must go hence with its appeal sustained.

More than eighty years ago American missionaries planted the seeds of American civilization in the Hawaiian Islands. In the days of the monarchy, as well as in the days of the republic, Fourth of July and Decoration Day were almost universally observed. On every street the American flag and the Hawaiian flag floated side by side.

When the Spanish war broke out the fighting strength of the American Navy was not understood, and the weakness of Spain was unknown. There was a Spanish fleet in the Pacific; Hawaii was a few islets in mid-ocean, defenceless even against Spain. Had George Dewey lost the battle of Manila there was nothing to prevent Honolulu from being laid in ashes and her people being put to the sword. Yet, when war became imminent, the Hawaiian government tendered the advantages of its harbors and geographical position to the United States. When war actually broke out, and three days before the news of the battle of Manila reached Honolulu, President Dole wired President McKinley offering him the alliance of the Republic of Hawaii. Honolulu was instantly made a base of supplies for American transports and American ships of war. More than one hundred thousand dollars was spent by citizens of Honolulu in feasting and entertaining American soldiers and sailors. They marched through our streets by thousands, laden with tropical fruit and garlanded with flowers. Government property was placed at their disposal, and they were entertained officially at the Capitol. The Spanish government, by its representative in Honolulu, protested against this violation of neutrality. The reply of the Hawaiian government was prompt: "We are not neutral; we stand with the United States."

Small and weak as we were, our geographical position enabled us to render enormous service. The people of the United States and their government have not forgotten it. The American government has always been generous to us; it has always been just, except when it has been misled by false statements. It has accepted the surrender of Hawaiian sovereignty as a public trust, in the spirit of President Dole's words, "I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship

of the American people, yield up to you, as the representative of the government of the United States, the sovereignty and public property of the Hawaiian Islands." In the same spirit of confidence, the Territory of Hawaii now submits to this august tribunal the question whether the Republic of Hawaii, during what is known as the transition period, had the right to maintain law and order and protect her citizens from criminals.

E. P. DOLE,
Attorney-General, Territory of Hawaii.

John K. Richards,
Solicitor General

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE TERRITORY OF HAWAII, APPELLANT,
v.
OSAKA MANKICHI.
No. 512.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

BRIEF OF THE SOLICITOR-GENERAL.

STATEMENT.

This is an appeal by the Territory of Hawaii from an order of the district court of the United States for that Territory (Estee, J.) discharging the petitioner in habeas corpus proceedings, Osaka Mankichi, from further imprisonment under a conviction for manslaughter.

The question involved arises under the Constitution of the United States, and is whether, during the transition period, after the transfer of sovereignty, on August 12, 1898, under the resolution of annexation of July 7, 1898 (30 Stat., 750), and prior to the establishment, on June 14, 1900, of a Territorial government under the organic act of April 30, 1900 (31 Stat., 141), the fifth and sixth amendments of the Constitution were in

force in Hawaii, so as to render void all indictments, trials, and convictions in criminal cases under the municipal legislation of the Hawaiian Islands, which, by the express provisions of the resolution of annexation, was to remain in force until Congress should otherwise determine.

Under the Hawaiian law in force in the islands during the rule of the Republic and of the monarchy which preceded it, the grand jury and petit jury of the Anglo-Saxon system were unknown.

There were no provisions whatever for the impaneling of grand juries. An indictment was prepared by the prosecuting officer (in this case the attorney-general) and was certified to as a true bill by the judge in accordance with the following provision:

> The necessary bills of indictment shall be duly prepared by a legal prosecuting officer and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not. (Section 616, Penal Laws of 1897.)

Racial and mixed juries were provided for. In criminal cases foreigners were tried by juries composed of foreigners, and Hawaiians by juries composed of Hawaiians. An agreement of nine out of twelve petit jurors was sufficient to authorize a verdict, under the following provision:

> No jury for the trial of any case, civil or criminal, shall be less than twelve in number;

but when nine of such jury agree upon a verdict they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve. (Section 1345, Civil Laws of 1897.)

On August 12, 1898, a formal transfer of sovereignty and property took place in accordance with instructions issued July 8, 1898, by President McKinley, through Secretary Day, to Minister Sewall. Under these instructions the Government of the Republic of Hawaii was continued and proceeded without interruption, awaiting the action of Congress. Copies of these instructions and the report of the transfer are printed in the appendix to this brief, the italics being mine.

On the 4th of May, 1899, the appellee, along with others, was indicted in the proper Hawaiian court, pursuant to section 616, above quoted, for the crime of murder in the first degree, the indictment being prepared by the attorney-general of the Republic and certified to as a true bill by the first judge of the circuit court of the first judicial district. At the May term, 1899, of that court the appellee was tried by a jury of twelve men, and was convicted of manslaughter in the first degree, three jurors dissenting, and was sentenced to imprisonment for the term of twenty years.

After the transfer of sovereignty (April 12, 1898) and before the indictment of the appellee, in May, 1899, the authority of the Government of Hawaii to administer the existing system of penal law, and thus

punish crime in the only way possible in the islands, was unanimously sustained by the supreme court of Hawaii in the case of *The Republic of Hawaii* v. *Edwards*, 11 Haw. Rep., 571 (decided November 4, 1898). The position thus taken was maintained unanimously by that court during the transition period. (*Republic* v. *Edwards*, 12 Haw., 55; *Peacock* v. *Republic*, 12 Haw., 27.)

The reorganization of the courts, pursuant to the organic act of the Territory, was followed by habeas corpus proceedings to test the validity, under the Constitution of the United States, of these decisions, and of course of all convictions during the transition period. On the same day two opinions of the supreme court of the Territory were filed, one holding that the fifth and sixth amendments took effect on the adoption of the resolution of annexation in 1898; the other that they did not take effect until the organization of the Territory under the organic act in 1900. This conflict was made possible by a provision of the law of Hawaii to the effect that when one of the justices of the supreme court is absent or disqualified a circuit court judge or a member of the bar may sit in his place. Chief Justice Frear and Associate Justice Galbraith held opposite views, and in the Marshall case the substitute for Justice Perry, who was absent, concurred with Judge Frear, while in the Edwards case the substitute for Judge Perry, being another person, concurred with Judge Galbraith.

Marshall, upon being remanded to the jail by the supreme court of the Territory, brought habeas corpus

proceedings in the district court of the United States. Judge Estee declined to assume jurisdiction. His opinion intimated a belief at that time that the fifth and sixth amendments did not take effect until the organization of the Territory in 1900.

After this, numerous cases of habeas corpus, including one in behalf of Osaka Mankichi, the appellee herein, were brought before Judge George D. Gear, second judge of the first circuit (Territorial) court. He held that the Constitution of the United States was extended to the islands *in toto* by the resolution of annexation, and that all the convictions during the transition period were void. On appeal, the supreme court of the Territory reversed him, Justice Galbraith dissenting, and the petitioners were remanded to imprisonment at hard labor. A petition for a writ of habeas corpus was then presented in behalf of Osaka Mankichi to Judge Estee, which he granted, having apparently changed the views which he intimated in the Marshall case. From his decision an appeal has been taken by the Territory to this court. Under like circumstances, Judge Gear, since the decision of Judge Estee, has discharged prisoners on habeas corpus, declaring that the decisions of the supreme court of the Territory violate the Constitution of the United States, and are, therefore, not binding on him.

In view of these facts, the interest of the United States in this case is apparent. Not only is it interested in preventing a general jail delivery, which will interfere with the adequate punishment of the dangerous characters who committed crimes in Hawaii during

the transition period, but it is interested in sustaining the construction which both the Government of the United States and the Government of Hawaii, in carrying out the contract of cession made by them, placed upon the resolution of annexation, and in upholding the power of Congress, under the Constitution, to continue without interruption the government and law of an independent country, annexed by agreement to the United States, with unimpaired authority for the protection of persons and property and the punishment of crime, until such time as Congress, after investigation and consideration, may be able to provide a government and law of its own.

ARGUMENT.

I.

At the time of the cession, the Hawaiian Islands constituted a sovereign and independent nation, with a government of its own, republican in form, and a civilized system of law, civil and criminal, defining rights and affording remedies. The courts were open and due process of law provided. At the same time, as in some of our States, grand juries were not used nor unanimous verdicts required to convict.

The system of criminal procedure in force is thus described by the supreme court of Hawaii in the opinion delivered by Chief Justice Judd in *Republic* v. *Edwards* (11 Haw., 571, 579):

> Grand juries have never been authorized in Hawaii. By our earliest law on the subject the prosecution of all offenses punishable by

law devolved upon the attorney-general. This law was enacted in 1847 (vol. 2, Laws of 1846–47, pp. 264, 265, et seq.) This officer was required to prepare bills of indictment, after examination of the offender, to be certified a true bill by the presiding judge, and this system has continued up to the present.

Unanimity of the jury has never been required in Hawaii. On the 5th of May, 1842, the king and chiefs passed a "law for the regulation of the courts." Section 20 reads: "When a man is tried for a capital offense, he shall not be condemned to die unless the jury is perfectly agreed. But in trials for other crimes, three-fourths of the jury shall be sufficient to decide the case." This was followed by the "act to organize the judiciary department," passed September 7, 1847. Section XXI of the act, Vol. II, acts 1846 and 1847, page 63, prescribed that "no jury for the trial of any civil or criminal case shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve." This provision was continued without change in the Civil Code adopted in 1859, section 1203, and is law up to the present day. The statute which enacts that a verdict by nine jurors is sufficient was held to be constitutional in *The King* v. *Andreas Camacho*, 3 Haw., Rep., 385.

By the treaty of annexation which was formally consented to by the Republic of Hawaii and submitted to this country, a cession was proposed upon certain

terms and conditions which were stated. By the passage of the resolution of annexation the offer of cession was accepted and the islands annexed "as a part of the territory of the United States" upon the terms stated in the treaty and incorporated in the resolution, which is printed in the appendix. This resolution contains special provisions with respect to the public lands of Hawaii, the customs regulations and relations of the islands, the public debt of the Republic, the immigration of Chinese, and the following general and significant provision securing the continuance of the Government and laws of the Republic during the transition period and until Congress should provide a new and permanent government:

> *Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons* and shall be exercised in such manner *as the President of the United States shall direct;* and the President shall have power to remove said officers and fill the vacancies so occasioned.
>
> The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of the Hawaiian Islands,* not enacted for the fulfillment of the treaties so extinguished, and *not inconsistent with this joint resolution nor contrary to the Constitution of the United States* nor to any existing

treaty of the United States, *shall remain in force until the Congress of the United States shall otherwise determine.*

* * * * *

So long, however, *as the existing government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided* said government shall continue to pay the interest on said debt [the public debt of the Republic of Hawaii].

* * * * *

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

These provisions clearly contemplated that the officers of the existing government of Hawaii should continue to exercise all the civil, judicial, and military powers then vested in them, and administer the Hawaiian law, for the protection of persons and property and the punishment of crime, until such time as Congress, acting upon the recommendation of the five commissioners representing both the Hawaiian islands and the United States, should frame a permanent government, under which the islands might be incorporated into the United States. The nature of the qualifications which were attached to these provisions will be considered later.

II.

That Congress had power thus to provide a temporary government, not subject to all the restrictions

of the Constitution, until it could frame a permanent government and incorporate the islands as a part of the United States, was held by this court in *Downes* v. *Bidwell* (182 U. S., 244). Mr. Justice Gray, in his concurring opinion in that case, referring to what he terms "the transition period," said (bottom page 346):

> If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.

That the resolution of annexation did not incorporate the islands within the United States and render them subject to all the limitations of the Constitution applicable throughout the United States, was evidently the view of the justices who constituted the majority of the court in the *Downes case.* Mr. Justice Brown, who delivered the opinion of the court, says (page 256):

> So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.

And Mr. Justice White, with whom Mr. Justice Shiras and Mr. Justice McKenna concurred, said (bottom page 304):

> By joint resolution of Congress the Hawaiian Islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the government of Hawaii was approved, by which the Hawaiian Islands were given the status of an incorporated territory.

In this connection, it may be well to point out that the provision that "no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands," is totally inconsistent with the theory that Congress intended by the resolution to incorporate the islands as an integral part of the United States, or extend the Constitution over them.

III.

It is urged that the use of the qualifying words "not contrary to the Constitution of the United States," after the words "the municipal legislation of the Hawaiian Islands," carried the Constitution into the islands and rendered void and inoperative every provision of the law of the Hawaiian Islands contrary to any of its limitations. If this be true, then the qualifying clause nullified the express and positive provision. The Hawaiian method of indicting and convicting criminals was an integral part of the criminal law of the islands. The resolution provided that the existing "municipal legislation" should remain in force until

Congress should otherwise determine. There was no provision for modifying or amending it. The transfer took place after the legislature had adjourned, and, by subsequent Executive order of President McKinley, the election of another legislature was indefinitely postponed. To strike down the law of criminal procedure was to deprive the Government of Hawaii of the power to preserve order and protect persons and property. It is not to be presumed that either party to the contract of cession intended this. It is not to be presumed that the Government of the Republic of Hawaii was continued for the purpose of protecting persons and property and punishing crime, and yet at the same time deprived of the use of the law by which alone this could be done.

The interpretation placed by President McKinley upon the resolution of annexation appears in the instructions for the transfer of sovereignty (printed in the appendix), in which he directed "that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty;" and in which, after referring in detail to the provisions of the resolution, he said:

> *Under these various provisions, the government of the islands will proceed without interruption.*

I call particular attention to the fact that the government during the transition period was not a new government, created by the President of the United States, but the existing government continued in the

exercise of all its powers, under the resolution, until Congress should organize the islands. This clearly appears in the report of the transfer of sovereignty, printed in the appendix. The question was discussed whether the officers of the Republic should take an oath of office as well as of allegiance. After President Dole and his colleagues had considered the point they advised Mr. Sewall that they had decided that all that was meant by the instructions and all that was necessary was an oath of allegiance.

> They were not elected nor appointed under the President of the United States, but were continued in the exercise of the duties of offices they already held and which it was the intention of the joint resolution and of my [Sewall's] instructions under them should not lapse.

Another question arising under the instructions was whether the proclamation should be addressed to the government and people, or to the people of Hawaii.

> After full consideration, the President agreeing, it was determined to address it to the government and people, on the theory that the government continued with the change of sovereignty without interruption.

The fact of the uninterrupted continuance of the government of the Republic during the transition period is further supported by the following instruction to Minister Sewall:

> Upon the completion of the formalities of the transfer, your functions as envoy extraordinary and minister plenipotentiary to Hawaii will nec-

> essarily cease. The President, however, directs that you shall for the time being remain in Hawaii as a special agent to conduct correspondence between the Government of the United States and the Government of Hawaii. Your correspondence will be conducted with the Department of State.

The status in the islands after the transfer of sovereignty under the resolution, is thus described by the supreme court of Hawaii in the *Edwards case* (11 Haw., Rep., 571, 578):

> The President of the United States, acting under the Newlands resolution, proclaimed that the government of the Hawaiian Islands "shall continue without interruption." No new scheme of government has been provided for these islands. The constitution and existing laws, therefore, must continue. It was so contemplated by the letter of the resolution itself. Its legal effect is that the sovereignty of Hawaii passed to the United States, while the laws of Hawaii were continued by the new sovereignty for the time being and until a new system of government and laws could be made for us. It must be so, or we would have no law. But it is urged that some of our municipal legislation is contrary to the Constitution of the United States, and that, particularly, the trial of the defendant without presentment by a grand jury is contrary to the fifth amendment to the Constitution of the United States, and that the verdict, not being unanimous, is inconsistent with the fourteenth amendment, because the conviction was not had by "due process of law." A

complete answer to these propositions is that there is no Hawaiian statute authorizing a grand jury or requiring unanimity of the jury in their verdicts, and to adopt these provisions in our criminal procedure without a statute authorizing them would violate the letter of the Newlands resolution, which continues our laws and does not make new ones for us.

IV.

If Congress had intended, by the resolution of annexation, to extend to the Hawaiian Islands our grand and petit jury system, it would have made some provision to that end. The omission indicates the lack of intention, which is confirmed by the provision contained in the organic act "To provide a government for the Territory of Hawaii," passed April 30, 1900. (31 Stat., 141.) In this measure Congress provided that the islands shall be known as the Territory of Hawaii (sec. 2); established a Territorial government (sec. 3); made all persons who were citizens of the Republic of Hawaii on August 12, 1898 (the date of the transfer of sovereignty), citizens of the United States (sec. 4); and provided that the Constitution and laws of the United States not locally inapplicable, with certain exceptions, should have the same force and effect within said Territory as elsewhere within the United States (sec. 5). The organization of the islands, their incorporation as a Territory of the United States, and the extension to them of the Constitution and laws of the United States, necessarily brought them, and for the first time, within the operation of the

fifth and sixth amendments, and therefore required the enactment of the following section, amending the law of civil and criminal procedure so as to extend our grand and petit jury system there.

> SEC. 83. That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only, in civil and criminal cases specified in said laws, *are repealed*, and all juries shall *hereafter* be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who can not understandingly speak, read, and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person *shall* be convicted in any criminal case *except by unanimous verdict of the jury*. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries, and shall sit at such times as the circuit judges of the respective circuits shall direct; the number of grand jurors in each circuit shall be not less than thirteen,

and the method of the presentation of cases to said grand jurors shall be prescribed by the supreme court of the Territory of Hawaii. *The several circuit courts may subpœna witnesses to appear before the grand jury* in like manner as they subpœna witnesses to appear before their respective courts.

Now, if, by the resolution of annexation, the Constitution was extended to the islands, and our grand-jury and petit-jury system put in force there, why were these provisions *inaugurating* our grand-jury and petit-jury system inserted in the organic act? All these provisions look to the future. It is obvious that Congress, in making them, acted in the belief that the Hawaiian law with respect to indictments and verdicts had continued in force during the transition period and would remain operative until the organic act should take effect.

V.

But what was the meaning and effect of the qualifying words "not contrary to the Constitution of the United States," used in the resolution? It is argued they must be held to extend the Constitution, with all its limitations, or be rejected altogether. No such alternative exists. The words had a meaning, and the meaning is plain. They were not employed to extend the Constitution. Before the islands could be incorporated and the Constitution with all its limitations extended, it was necessary that a new government should be framed and an organic act passed. But by

the transfer of sovereignty, the bringing of the islands under the sovereign dominion of the United States, certain limitations of the Constitution became operative there. These qualifying words were inserted in recognition of the fact that there are certain fundamental rights which the Constitution protects wherever the sovereignty of the United States extends. The nature of these rights, and of the limitations which for their protection apply wherever the flag flies, was discussed by me in the Insular Tariff cases. I refer the court to the portion of my argument printed in 182 U. S., pages 152 to 159. But the right to be indicted by a grand jury and tried by a petit jury does not come within this category. The distinction between natural or fundamental rights and artificial or remedial rights, under the Constitution, is pointed out by Mr. Justice Brown in the opinion in the *Downes case* (182 U. S., 282).

> We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of

justice; to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor* v. *Happersett*, 21 Wall., 162), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the *status* of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—*it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress.*

I do not know whether there were any provisions of the Hawaiian law inconsistent with those prohibitions and limitations of the Constitution which apply everywhere; but if there were, they were contrary to the Constitution and became inoperative upon the transfer of sovereignty.

An analysis of the paragraph providing for the continuance in force of the municipal legislation of the islands will demonstrate that all the qualifying clauses

flow of necessity from other provisions of the resolution. They explain the effect and carry out the purpose of the other provisions. They do not abrogate or nullify them. The full paragraph is as follows:

> The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Following the provision that the existing treaties of the Hawaiian Islands with foreign nations should cease and determine, being replaced by the treaties between the United States and such nations, the positive provision is as follows:

> The municipal legislation of the Hawaiian Islands * * * shall remain in force until the Congress of the United States shall otherwise determine.

Where I have placed the stars were inserted the following qualifying clauses, each of which follows naturally and irresistibly from other provisions of the resolution:

(*a*) "*Not enacted for the fulfillment of the treaties so extinguished;*" obviously such legislation fell with the treaties.

(*b*) "*Not inconsistent with this joint resolution;*" because the resolution contains certain provisions inconsistent with the existing law of Hawaii; for example, the provision regulating Chinese immigration.

(*c*) "*Nor contrary to the Constitution of the United States;*" because by the cession the Hawaiian Islands were made subject to the sovereign dominion of the United States, and there are certain limitations of the Constitution which apply to every place subject to the jurisdiction of the United States; and

(*d*) "*Nor to any existing treaty of the United States;*" because the resolution substituted these treaties for the Hawaiian treaties.

All of these qualifying clauses are merely declaratory of what follows irresistibly from other provisions of the resolution. If they had been omitted, the meaning of the resolution would be the same. They were inserted simply for the sake of clearness. They explained but did not enact.

VI.

That the right to be indicted by a grand jury and be tried by a petit jury is not fundamental, that the fifth and sixth amendments enforcing this right apply only to the Federal courts, and that a citizen of the United States in a criminal prosecution in a State

court may be deprived of his life, liberty, or property, by due process of law, without indictment by a grand jury and without unanimity in the verdict of a petit jury, is the established doctrine of this court.

In *Brown* v. *New Jersey* (175 U. S., 172), Mr. Justice Brewer, speaking for the court, said (page 175):

> The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. (*Ex parte Reggel*, 114 U. S., 642; *Iowa Central Railway* v. *Iowa*, 160 U. S., 389; *Chicago, Burlington and Quincy Railroad* v. *Chicago*, 166 U. S., 226.) "The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each State prescribes its own modes of judicial proceeding." (*Missouri* v. *Lewis*, 101 U. S., 22, 31.)
>
> The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand

> jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information. (*Hurtado* v. *California*, 110 U. S., 516.)

In *Bolln* v. *Nebraska* (176 U. S., 83) the court, speaking by Mr. Justice Brown, said (p. 88):

> This court has also repeatedly held that the first eight amendments to the Constitution applied only to the Federal courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska, and thereby a hard and fast rule made for that State that would forever preclude amendments inconsistent with the Bill of Rights of the Federal Constitution, and which this court has held to be applicable only to Federal courts. As we have repeatedly held, the fourteenth amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life.

In *Maxwell* v. *Dow* (176 U. S., 581) the court goes into the question of what are the privileges and immunities of a citizen of the United States which no State can abridge, putting the question thus (top p. 586):

> Do they include the right to be exempt from trial for an infamous crime in a State court and under State authority except upon presentment by a grand jury? And do they also include

the right in all criminal prosecutions in a State court to be tried by a jury composed of twelve jurors?

The court, Mr. Justice Peckham delivering the opinion, points out that there are certain privileges and immunities which may not be abridged, but reaches the conclusion that these rights are not among them (p. 604):

> It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. (*Caldwell* v. *Texas*, 137 U. S., 692; *Leeper* v. *Texas*, 139 U. S., 462.) It is emphatically the case of the people, by their organic law, providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than anyone else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado case*, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment and the right to a

trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the States respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves.

VII.

It thus appears that the Hawaiian Islands, in providing for indictment without a grand jury and for conviction without the unanimous verdict of a petit jury, was only doing what a State of the Union may do under the Constitution. In 1854, during the Administration of President Pierce, a draft of a treaty for the annexation of Hawaii was agreed upon, but, owing to the death of the King of the Hawaiian Islands, was not executed. This treaty provided for the incorporation of the Hawaiian Islands into the American Union as a State. By the resolution of annexation the islands were brought under the dominion of the United States, but it was not determined in what way they should be incorporated. Suppose Congress, upon the recommendation of the five commissioners provided for by the resolution, had decided, by the organic act, to admit the Hawaiian Islands into the Union as a State. Obviously this could have been done without changing in any respect the law of the islands regulating criminal procedure. As a State the government of the islands could have

continued, under the Constitution, to indict criminals without a grand jury and convict them without the unanimous verdict of a petit jury. With this power in Congress, can it be reasonably contended that Congress could not permit the government of Hawaii to continue to administer its own law of criminal procedure, until it should be determined in what way the islands should be incorporated into the United States? The condition of the islands during the transition period was suspensive, their future government and law undetermined. The sensible course under these circumstances was to permit the existing government to proceed without interruption until Congress could determine intelligently what ought to be done. And this is just what the resolution provided.

VIII.

The fifth and sixth amendments apply only to the courts of the United States. They contemplate organized Federal judicial districts. The courts of Hawaii during the transition period were not courts of the United States. They were the courts of the Republic of Hawaii, continued of necessity until Congress could organize the islands and establish Federal districts and Federal courts. The judicial powers which by express provision were to be exercised during the transition period were the existing judicial powers of the Hawaiian courts. These judicial powers did not include the power to impanel grand juries or to subpœna witnesses before grand juries, or to try criminals by a petit jury after the manner required in Federal

courts. There was no Hawaiian law for this, and therefore no judicial power. The judicial power which was continued under the resolution was the power to accuse and try and convict in the manner provided by the Hawaiian law and by that alone; and there was no authority to change or modify that law, for the resolution expressly provided that the municipal legislation of the islands should remain in force until Congress should otherwise determine.

Finally, let me point out that among the judicial powers exercised under the Republic of Hawaii and to be exercised during the transition period, was the power in the supreme court of the islands to pass finally upon all disputed questions of criminal procedure. This court was the only court which could decide such questions at that time. The question raised in the case at bar was unanimously determined by it in favor of the government. While I do not pretend to say that this decision is binding upon this court, I do submit that, under the peculiar circumstances, weight ought to be given to the views of the supreme court of Hawaii upon the matter.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 12, 1902.

APPENDIX.

JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES (30 STAT., 750).

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed *as a part of the territory of the United States and are subject to the sovereign dominion thereof,* and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided,* That all revenue from or proceeds of

the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner *as the President of the United States shall direct;* and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of the Hawaiian Islands,* not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any exist ing treaty of the United States, *shall remain in force until the Congress of the United States shall otherwise determine.*

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands *the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.*

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by

the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. *So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.*

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and *no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.*

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, *recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.*

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved July 7, 1898.

JULY 8, 1898.—DAY TO SEWALL.—INSTRUCTIONS FOR TRANSFER OF SOVEREIGNTY, ETC.

No. 145.] DEPARTMENT OF STATE,
Washington, July 8, 1898.

HAROLD M. SEWALL, Esq., etc.,
Honolulu, H. I.

SIR: I inclose herewith a copy of a joint resolution of Congress, approved by the President on July 7, 1898, entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States."

By the preamble to this resolution it is recited that the Government of the Republic of Hawaii has, in due form, signified its consent, in the manner provided by its constitution, "to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government, or crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining."

These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated in the joint resolution, *because they embody the terms of cession which have not only been agreed upon by the two Governments, but which have also been ratified by the Government of the Republic of Hawaii.* The joint resolution therefore accepts, ratifies, and confirms on the part of the United States the cession

formally agreed to and approved by the Republic of Hawaii.

As by the adoption of the joint resolution the cession of the Hawaiian Islands and their dependencies to the United States is thus concluded, it is assumed that no further action will be necessary on the part of the Hawaiian Government beyond the formalities of transfer. Should that Government, however, desire to take any further action, formally confirmatory of what has been done, no objection will be interposed on the part of the United States.

When all preliminaries shall have been settled, you are instructed to accept, in the name of the United States, the formal transfer of the sovereignty and property of the Hawaiian Government, and to raise the American flag, with such suitable ceremonies as may be agreed on for the occasion. It may be advisable for the Hawaiian Government to deliver to you an inventory of the public property transferred to the United States.

There are several provisions of the joint resolution to which it is deemed proper specially to refer.

Until Congress shall provide for the government of Hawaii, "all the civil, judicial, and military powers exercised by the officers of the existing government" are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct. In the exercise of the power thus conferred upon him by the joint resolution, the President hereby directs that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies. All such officers will be required at once to take an oath

of allegiance to the United States, and all the military forces will be required to take a similar oath; and all bonded officers will be required to renew their bonds to the Government of the United States.

The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease, so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers.

The municipal legislation of Hawaii, except such as was enacted for the fulfillment of the treaties between that country and foreign nations, and except such as is inconsistent with the joint resolution, or contrary to the Constitution of the United States or to any existing treaty of the United States, is to remain in force till the Congress of the United States shall otherwise determine. The existing customs relations of Hawaii with the United States and with other countries are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the islands.

Under these various provisions, the government of the islands will proceed without interruption.

Upon the completion of the formalities of the transfer, your functions as envoy extraordinary and minister plenipotentiary to Hawaii will necessarily cease. *The President, however, directs that you shall for the time being remain in Hawaii as a special agent to conduct correspondence between the Government of the United States and the Government of Hawaii. Your correspondence will be conducted with the Department of State;* and, for the time during which your special agency may last, you will receive, out of the fund provided for carrying the joint resolution into effect, compensation at the same rate as heretofore.

As the joint resolution provides for the continuance for the present of the existing customs relations of Hawaii with the United States and other countries, the consul-general of the United States will, till further notice, continue to discharge his duties as heretofore.

These instructions will be borne to you by Rear-Admiral Joseph N. Miller, U. S. Navy, who will proceed to Honolulu in the U. S. S. *Philadelphia*, and who, together with the commander of the United States military forces present, will act with you in the ceremonies attending the formal transfer of the islands to the United States.

Respectfully, yours,

WILLIAM R. DAY.

AUGUST 15, 1898.—SEWALL TO DAY.—REPORT OF TRANSFER OF SOVEREIGNTY.

SPECIAL AGENCY OF THE UNITED STATES,
Honolulu, H. I., August 15, 1898.

Hon. W. R. DAY,
Secretary of State, Washington, D. C.

SIR: Referring to your instructions of July 8, 1898, and my dispatch No. 196 of August 8, 1898, I have the honor to report that the formal transfer of the sovereignty and property of the Hawaiian Government took place Friday, the 12th instant, the American flag being raised over the Government house at noon.

Upon receipt of your instructions above mentioned and in pursuance of them, I placed myself in communication with Admiral Miller, and discussed at length the preliminaries to be arranged. I also notified Maj. Gen. E. S. Otis, commanding independent division of Eighth Army Corps then here, that I was instructed to

confer with the commander of the United States military forces present, but his reply was that the interests of the service in his opinion demanded that the transports with the men under his command should be off as soon as possible. He added that the First New York Regiment would be here and that its commanding officer would be a fitting army representative. Accordingly, with Admiral Miller, Col. Thomas M. Barber, although his regiment had not arrived, acted with me at the ceremonies.

At the meeting with the President and cabinet reported in my dispatch above mentioned, after full discussion, it was decided that the ceremonies should open with the presentation to President Dole of the certified copy of the joint resolution. In accepting this he would relinquish the sovereignty and property of Hawaii, after which he would direct the Hawaiian flag to be hauled down. This was the suggestion of Admiral Miller and myself. I was then to accept the transfer and direct the Admiral to raise our flag, after which I would read a part of my instructions in the nature of a proclamation, and then the oath would be taken.

Later this order was changed by the introduction of a prayer, and I gave notice to the minister of foreign affairs that I might at the conclusion of reading my instructions make a short address. President Dole also consented to speak briefly at the drill grounds, when he would present an American flag to the Hawaiian troops, after they had taken the oath of allegiance.

In the course of the following days several questions came up for discussion and settlement.

The most important of these was the question of the oath. I told the attorney-general that, as he knew, all

the instructions called for was an oath of allegiance, but I pointed out that an oath of allegiance was not an oath of office, and I suggested for his consideration that it might be advisable to administer the oath of allegiance and of office. He said he would confer with his colleagues on the point. After he had done so, the President informed me that they had considered the point and had decided that all that was meant by the instructions and all that was necessary was an oath of allegiance. *They were not elected nor appointed under the President of the United States, but were continued in the exercise of the duties of offices they already held and which it was the intention of the joint resolution and of my instructions under them should not lapse.*

Next was the question, Who should administer the oath? It had been the original plan that I should administer the oath to the chief justice, and he in turn to the President and cabinet and members of the executive council. I stated that I could not find that I had the power to administer the oath, but that the secretary of legation had this power. After consideration of this point, the President said it was the preference of his Government that the chief justice administer the oath, that in their judgment he would be invested with his office as soon as I should read my instructions, and taking the oath himself was not a condition precedent. Moreover, this would agree with the procedure on the other islands, where the district magistrates were to administer the oaths.

The third question was, To whom should my instructions, which I was to read in the nature of a proclamation, be addressed—to the Government and people, or to the people of Hawaii? *After full consideration, the President agreeing, it was determined to*

address it to the Government and people on the theory that the Government continued with the change of sovereignty without interruption.

During the discussion of these questions President Dole called attention to the fact that the ratification on the part of Hawaii of the treaty of annexation which took place on the 11th day of September, 1897, had not yet been delivered to our Government, and proposed that this delivery be made a part of the ceremonies. I thought better not, and on the morning of the 12th, before the ceremonies, I received the document at the hands of the minister of foreign affairs and transmit it herewith.

The invitations and lesser details of the ceremonies were left to the Hawaiian Government. I especially requested that invitations be sent to ex-Queen Liliuokalani, Kapiolani the Queen Dowager, Kaiulani and her father, A. S. Cleghorn, ex governor of Oahu, also the Princes David and Cupid, nephews of Kalakaua. This was agreed to, but none of these invitations were accepted.

The details for the disposition of the naval forces were attended to by Admiral Miller.

The Hawaiian National Guard met our forces from the *Philadelphia* and *Mohican* at the boat landing and escorted them to the grounds of the Government House, the former palace; our men occupied the center of the driveway, to the right and left being companies of the Citizens' Guard of Honolulu, and the Hawaiian police and regimental forces.

At a quarter before 12 the ceremonies opened with prayer, at the conclusion of which I arose, addressing President Dole said:

"Mr. President, I present you a certified copy of a joint resolution of the Congress of the United States,

approved by the President on July 7, 1898, entitled 'Joint resolution to provide for annexing the Hawaiian Islands to the United States.'

"This joint resolution accepts, ratifies, and confirms on the part of the United States the cession formally consented to and approved by the Republic of Hawaii."

As I had written this and submitted it, it read "the cession formally 'agreed to'" the words used on the second page of my instructions. President Dole, however, preferred the words "consented to."

President Dole, taking the copy of the resolutions, said:

"*A treaty of political union having been made, and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America;* I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice, and friendship of the American people, yield up to you as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands," and waving his hand to his chief of staff, the Hawaiian flag was saluted by the battery of the Hawaiian National Guard, in which salute our ships in the harbor joined. Then the Hawaiian band played Hawaii Ponoi for the last time, taps were sounded, and the Hawaiian flag came down, and was taken possession of by the Hawaiian corporal of the guard.

Then, replying to President Dole, I said:

"Mr. President: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian government.

"The admiral commanding the United States naval forces in these waters will proceed to perform the duty intrusted to him."

Thereupon the American flag was raised as the bands played the Star Spangled Banner and saluted. It floated from the staff at exactly fifteen seconds past 12 o'clock.

Then I read my instructions in the form I had arranged to do:

"*To the Government and people of the Hawaiian Islands:*

"By the terms of the joint resolution by which the cession of the Hawaiian Islands and their dependencies to the United States is concluded it is provided that until Congress shall provide for the government of Hawaii, all the civil, judicial, and military powers exercised by the officers of the existing Government are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct.

"*In the exercise of the power thus conferred upon him by the joint resolution the President hereby directs that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii*, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies.

"*All such officers will be required at once to take an oath of* ALLEGIANCE *to the United States*, and all the military forces will be required to take a similar oath, and all bonded officers will be required to renew their bonds to the Government of the United States.

"The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers.

"*The municipal legislation of Hawaii*, except such as was enacted for the fulfillment of the treaties between

that country and foreign nations, and *except such as is* inconsistent with the joint resolution, or *contrary to the Constitution of the United States* or to any existing treaty of the United States, *is to remain in force till the Congress of the United States shall otherwise determine.*

"The existing customs relations of Hawaii with the United States, and with other countries, are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the islands.

"*Under these various provisions, the government of the islands will proceed without interruption.*"

And at the conclusion of this said:

"Fellow countrymen: I congratulate you on the consummation this day records—a consummation, not a change—the inevitable consummation of the national policies and the natural relations between the two countries now formally and indissolubly united.

"Inevitable as has been this union, we may rejoice that it will take its place in history with the awakening of the American people to a sense of their responsibility among nations, in that splendid procession of events begun at Manila and which has now embraced these islands in its broad sweep.

"You are no strangers to your countrymen across the sea, bound to them as you are, by the achievements of their sons and brothers here, and by all the activities that make up a country's life. You are no strangers; certainly not in the momentous present. For as it comes to every nation in the dread ordeal of war to test the loyalty of all its sons and devotion of all its friends, so they have tested you, tried you, and found you true, when you refused to listen to the suggestions of the selfish and timid, and at your peril, offered up all that these islands had to offer, as a sacrifice on the altar of

devotion to a country you had not yet the right to call your own.

"And your countrymen can never forget that this loyalty and devotion and the opening of hearts and houses to our soldier boys that followed this, was the loyalty, the devotion, and the hospitality, not of Americans, though this were sweet indeed, but of men who sought to be Americans and had been denied, of men who founded a state for the purpose of admission to the American Union and had been denied, of men who presented this strange spectacle to the world that they stood ready, as you gentlemen about me to-day, to give up office, and power, and personal emoluments and glory, for the simple dignity of American citizenship. Even as you have given up a flag you love, and surrendered the sovereignty of these beautiful islands, that Hawaii may take her place, however humble that place may be, in the protecting circle of sovereign American States.

"This is the consummation you witness to-day, which you and your children's children will have the right to celebrate, and let there be no mistake as to its meaning. It means the triumph of no party or faction among you, the opportunity for no personal glorification or personal resentment, the confirmation in power of no authority over you that shall not commend itself to the sense of fairness and of justice of the representatives of the American people, but rather the burial of past prejudices, the obliteration of narrow divisions, and the ultimate political advancement of the humblest citizen over whom this flag shall float.

"But it is not for you to rest content in the enjoyment of free institutions. It is for you to help maintain them, to maintain them in the spirit they will be extended to you, in the spirit you have sought them,

in the spirit of fraternity and equality, in the spirit of the Constitution itself, now the supreme law of your land, to establish justice, to insure your tranquillity, to provide for the common defense, to promote your welfare, and to secure the blessings of liberty to yourselves and your posterity.

"This is the work before you, my countrymen, and I bid you advance to it. Hand in hand may you go, you of the home race, with those whose fathers' land this was, and whose generous virtues have won for them the regard of all mankind. Hand in hand may you go with them as they carry with them their unfaltering love of country into the broad plane of American citizenship.

"Advance to the uplifting and upbuilding of this land to prove it worthy to share the destiny of the great Republic.

"Empire may wait, indeed, but no hand save His who holds in the hollow of His hand the fate of nations can stay that destiny.

"God bless you, my countrymen.

"God bless the United States of America."

After this an oath of allegiance was administered by Chief Justice Judd, as follows:

"I do solemnly swear that I will support and defend the Constitution of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion. So help me God."

The brevity, impressiveness, and entirely official character of the cermonies have been generally commended, and have produced an excellent impression, especially among those who have felt hostile.

The official ceremonies being concluded, the Hawaiian troops took the oath of allegiance at the drill shed and were presented by President Dole with the flag carried by the *Boston's* battalion in the landing of our forces in 1893.

At the same time that the flag was raised on the Government House what is said to be the same flag that was lowered by order of Commissioner Blount from the judiciary building was raised there.

A proposition has been made and strongly indorsed to have the Hawaiian flag raised on one of the staffs as a territorial or local flag, but I said that my instructions did not make this possible.

In the afternoon the oath of allegiance was administered to the minor Government officials.

I inclose copies of newspapers.

I have the honor to be, sir, your obedient servant,

HAROLD M. SEWALL.

O

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 12 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE TERRITORY OF HAWAII, APPELLANT,
v.
OSAKA MANKICHI. } No. 219.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

SUPPLEMENTAL BRIEF FOR APPELLANT.

By EDMUND P. DOLE.

In the Supreme Court of the United States.

OCTOBER TERM, 190?

THE TERRITORY OF HAWAII, APPELLANT,
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I.

Annexation was by contract, and was not a mere taking by Congressional authority, as claimed by appellee.

The Provisional Government of Hawaii was created in January, 1893, mainly with a view to annexation to the United States. The Provisional Government and President Harrison's administration agreed upon the terms of a treaty, which was submitted to the United States Senate for ratification. Before it could be acted upon President Harrison's term of office expired, and President Cleveland withdrew the treaty.

There being no prospect of annexation for at least four years, a more permanent form of government for

the Republic of Hawaii was established in 1894. Article 32 of its constitution was as follows:

> The president (of the Republic of Hawaii), with the approval of the cabinet, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of America, subject to the ratification of the senate.

The terms of a treaty of annexation were subsequently agreed upon between President McKinley's administration and President Dole's administration. They were ratified in the Hawaiian senate in September, 1897. Later it was thought advisable to adopt the form of a joint resolution, and the Newlands resolution, socalled, *was identical in its terms with the proposed treaty ratified by the Hawaiian senate.*

A joint resolution of Congress annexing a foreign country is of no legal validity *per se.* It requires the assent of the other party, which makes it a contract. It became a contract when it was acceded to by the Hawaiian Government in the proceedings set forth on pages 8 and 9 of my printed argument, or else by the assent theretofore expressed. All the elements of a contract existed. It was a contract and nothing but a contract.

II.

In interpreting this contract, the intention of the parties is the polestar of the court. If the written instruments, taken by themselves, are ambiguous, the court will take into account everything that can shed

light upon the transaction; its history, existing conditions, the advantages which the parties expected to realize by the contract, the evils which they expected to escape, and the constructions which they themselves put upon it by their contemporaneous and subsequent acts. In considering such a contract, the court will also take into account considerations of justice and humanity and well-settled principles of international law, and will not lightly presume that a civilized government intentionally surrendered the elemental rights of its citizens to protection from crime. The law is made for man, not man for the law, and a construction which would leave society powerless to protect itself from murderers, rapists, robbers, and other like criminals, and powerless even to detain the prepetrators of such outrages, is not to be favored.

III.

If the fifth and sixth amendments to the Constitution of the United States became applicable to the Hawaiian Islands with the surrender of national sovereignty, then, for a period of nearly two years, the people of those islands did not have, and could not have, any legal machinery for the protection of life and property or for the punishment of criminals, or even for their detention.

For more than half a century Hawaiian law had provided that:

> In all cases of arrest for crimes or misdemeanors cognizable before a jury, the magistrate in whose jurisdiction or on whose warrant

the accused was arrested shall, upon the appearance of the accused, proceed to consider whether there is probable cause to believe that a jury would, upon the evidence adduced, convict the accused of the offense with which he is charged, he shall reduce to writing the substance of the evidence adduced, with the names of the witnesses, and if, in his opinion, the testimony do not warrant commitment for trial, he shall release the prisoner, noting that fact upon his docket; but if, in his opinion, there is probable cause to believe that conviction would take place before a jury, he shall make out and deliver to a constable a mittimus, which may be in the following form: * * *

In all cases of offenses against the laws of this Republic, triable only by a court of record, the accused shall be arraigned and prosecuted by an indictment by a legal prosecutor of the Republic, as soon after the commitment of the offense of which he is accused as may be expedient; provided always that the presentation of an indictment against an accused shall not be deferred beyond the term of the court having jurisdiction of the alleged offense next succeeding the commitment of the accused for trial by a magistrate having competent jurisdiction therefor. And the trial shall then and there be proceeded with, unless the same shall be postponed by the court as hereinafter provided.

The necessary bills of indictment shall be duly prepared by a legal prosecuting officer and be duly presented to the presiding judge of the court before the arraignment of the

accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not.

The failure to prosecute upon the indictment, if found at the ensuing term of the court, unless the venue be changed, or unless the cause be postponed by the court, or a failure to sustain the indictment upon the law involved, or a verdict of not guilty by the jury, or the successive disagreement of two juries impaneled to try the cause, shall operate as an acquittal of the accused, and the court shall order his discharge from custody. (Secs. 610, 615, 616, and 617 of the Penal Laws of 1897.)

The foregoing provisions, in substance, were in force for half a century.

For more than half a century Hawaiian law (except from 1842 to 1847, when capital cases required unanimous verdicts) provided that—

No jury, for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve. (Sec. 1345, Civil Laws, 1897.)

All native Hawaiians, accused of any crime, shall be tried by a jury composed entirely of natives, and all foreigners, by a jury composed entirely of foreigners, who shall be drawn from the array of native and foreign jurors respectively returned to serve at the term. (Sec. 1332, Civil Laws, 1897.)

Racial juries were instituted with the beginning of the jury system in the Hawaiian Islands, and were continuously in force until the taking effect of the organic act.

Hawaiian law also provides that—

> The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian judicial precedent, or established by Hawaiian national usage: *Provided, however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.* (Sec. 1109, Civil Laws, 1897.)

It is obvious that the foregoing provisions are foreign to the grand and petty jury system contemplated by the fifth and sixth amendments to the Constitution of the United States. These amendments are not automatic. The Hawaiian courts could not work under them without the aid of appropriate legislation. The Newlands resolution provided no such legislation and made no reference to these amendments. When national sovereignty was surrendered the next regular session of the legislature was about eighteen months in the future, and Congress had adjourned. Assuming that it was advisable to legislate, it would have been two or three months before appropriate legislation could have been passed and have taken effect. Meanwhile, the people of Hawaii (assuming that the fifth and sixth amend-

ments were then applicable) would have been without legal protection from crime, and without legal power to detain criminals. When the next regular session of the Hawaiian legislature approached President McKinley, by virtue of the powers vested in him by the Newlands resolution, postponed its meeting for a year in order that the situation might remain unchanged until Congress should provide a new scheme of government. I have quoted his order in full on page 11 of my first brief. Under these circumstances the legislation to make the fifth and sixth amendments operative for the indictment and trial of accused persons was impossible, and if they were applicable to the Hawaiian Islands at that time, *they operated simply as a guaranty of immunity from punishment or detention for any and every crime that might be committed.*

Moreover, if legislation had been possible, intelligent legislation would have been impossible, for the status of the islands was merely temporary, and no one could know what their permanent status would be.

IV.

If there had been legal machinery for judicial work under the fifth and sixth amendments, it must have failed for want of duly qualified citizens of the United States to operate it. No one can be a citizen of an American State or of an American Territory unless he is a citizen of the United States. The fifth and sixth amendments contemplate common-law grand and petit juries, and no others. No one can be a grand

or petit juror pursuant to these amendments unless he is a male citizen of the United States of full age and a resident of the judicial district in which the court is held. There is not a line in the Newlands resolution which can be construed as conferring citizenship upon anyone in Hawaii. The organic act conferred this nearly two years later. Section 4 provides:

> That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are *hereby* declared to be citizens of the United States and citizens of the Territory of Hawaii.

Neither the Hawaiian courts nor the Hawaiian legislature had authority to make American citizens. There were no American citizens in Hawaii prior to June 14, 1900, except those who were such by birth or by American naturalization. According to the official census of 1896, they numbered 2,266; less than one-tenth of the white population of the islands. The islands were divided into five judicial circuits or districts. The American population was mostly in the first circuit. The other four circuits, with a population of 68,815, contained only 658 American citizens; 24 of the 658 lived on remote islands, and for practical purposes were beyond the reach of summons. Counting out women and children, old men, sick men, absentees, professional men, and Government officials, exempt by law from jury duty, and men who had not taken the oath of denization required by Hawaiian law, there were probably less than 200 citizens of the

United States eligible and available for jury duty under the fifth and sixth amendments in four circuits, with an aggregate population of 68,815.

The fifth circuit, with a population of 15,392, contained only 60 male citizens of the United States, including boys; not more than 25 or 30 men, at the most, eligible and available for jury duty under the fifth and sixth amendments, yet the law required that 36 should be summoned for the petty jury, and there can not be a grand jury of less than 13.

The law does not countenance the absurd or sanction the impossible. The language of Mr. Justice Field in *In re Ross* (140 U. S., 464), is strikingly applicable to these conditions:

> And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and try an offender would, in a majority of cases, cause an abandonment of all prosecutions.

The strength, the fundamental idea of the jury system, whether grand or petit, is that it represents the people. The petit jury has been spoken of as—

> The twelve invisible judges whom the eye of corruption can not see and the influence of the powerful can not reach; for they are nowhere to be found until the moment when, the balance of justice being placed in their hands, they

hear, weigh, determine, pronounce, and immediately disappear and are lost in the crowd of their fellow-citizens.

The jury system is designed as a safeguard. Its chief function is to distribute the administration of justice, to divide the responsibility among all classes, and not to concentrate its burdens and responsibilities upon a few. Where jurymen must be drawn from a nationality numbering less than one in a hundred of the population, the representation of the public, which the jury system is designed to embody, does not and can not exist. Assuming that legal machinery could have been provided for drawing and impaneling grand juries during this transition period, such procedure would have violated the genius and spirit of the Constitution of the United States. The letter of the Constitution is not to be strained to the destruction of its spirit. "The letter of the law killeth; the spirit giveth life."

If the fifth and sixth amendments were in force during the transition period, neither the substantial interests of the Hawaiian Islands nor the people born there, nor nineteen-twentieths of the people born elsewhere, could have been represented by any jury. If Hawaii had been a subjugated but still hostile country such a course might have been justified by military law; but Hawaii came to the United States with open arms, "confiding in the honor, justice, and friendship of the American people," and believing that it had retained such local rights of citizenship as were essential to rep-

resentative government in local affairs and the preservation of law and order.

V.

It is inconceivable that either the Republic of Hawaii or the United States should have intended to subject the people of Hawaii to conditions incompatible with the protection of life and property and preservation of civilized government. We come then to an examination of the contract with the strongest presumption that no such outrage was contemplated by either party.

The Newlands resolution declared that, "until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned. The existing treaties of the Hawaiian Islands shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine. Until legislation

shall be enacted extending United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged. * * * So long * * * as the existing government and the present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided for, said government shall continue to pay the interest on said debt. * * * No Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands. The President shall appoint five commissioners, * * * who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary and proper."

The surrender of sovereignty on the part of the Republic of Hawaii and its acceptance on the part of the United States was in the following language:

Minister Sewall said—

> Mr. President, I present you a certified copy of a joint resolution of the Congress of the United States, approved by the President on July 7, 1898, entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States." This joint resolution accepts, ratifies, and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii.

President Dole replied:

> A treaty of political union having been made and the cession formally consented to by the

> Republic of Hawaii having been accepted by the United States of America, I, now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice, and friendship of the American people, yield up to you, as the representative of the American people of the United States, the sovereignty and public property of the Hawaiian Islands.

Whereupon Minister Sewall said:

> Mr. President, in the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government.

In his proclamation, President McKinley, after reciting the terms of the joint resolution, declared "that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies. * * * That the municipal legislation of Hawaii (subject to the exceptions set forth in the joint resolution) was to remain in force until the Congress of the United States should otherwise determine." The President ended his proclamation with the significant statement, "Under these various provisions the government of the islands will proceed without interruption."

All this proves beyond question that there was a contract, not a mere assumption of sovereignty on the one hand and a submission on the other without contract guaranties. And it shows that both parties understood and intended that the functions of civilized

government should continue in the Hawaiian Islands, *judicial as well as other functions*, on substantially the old lines until a new scheme of government should be provided for. The words "nor contrary to the Constitution of the United States" must be construed in connection with the context, with the transaction as a whole, the obvious intention of the parties, and in the light of all surrounding facts and circumstances.

VI.

The construction which both parties put upon the contract is beyond dispute. It seems to me that it is conclusive.

Shortly after the surrender of national sovereignty the American members of the Commission appointed by President McKinley arrived in Honolulu. Within a day or two after their arrival they requested the views of the Hawaiian Government in regard to its political status. Hon. W. O. Smith, then attorney-general, requested me to write an opinion. It may be sufficient for me to say that the opinion which I wrote was in line with the position which I take before this court. It was submitted to the Commissioners as the opinion of the Hawaiian Government. It met the approval of the commissioners. It was unanimously sustained by the supreme court of the Republic of Hawaii. As my opinion it is of little consequence, but as the official opinion of the Hawaiian Government, approved by the Commission appointed by President McKinley and in line with President McKinley's Administration, it has an important bearing upon the

understanding of the parties. Two opinions rendered to the United States Government by Attorney-General Griggs were along the same lines, and are very material as showing the understanding of the Federal Government. They are found in volume 22, Opinions of Attorneys-General, pages 153 and 249. I quote from them as follows:

> The resolution of Congress which, with the corresponding action of the Republic of Hawaii, annexed the Hawaiian Islands to the United States, operated for international purposes to make those islands part of the territory of the United States. But when territory is acquired by treaty or conquest, or otherwise, its relations to the nation acquiring it depend upon the laws of that nation, unless controlled by the instrument of cession. It may for certain purposes remain foreign temporarily or permanently, and is not presumed to be at once put upon the same footing as all other territory of the nation, but rather the contrary. When, therefore, Florida had been ceded and fully transferred to the United States, its ports were regarded as foreign within the meaning of our revenue laws. (*Fleming et al.* v. *Page*, 9 How., 617.) This being so, it seems to me we should be able to find some provision in the resolution annexing the Hawaiian Islands indicating an intention to change the relations of our tonnage-tax laws to Hawaiian ports and vessels coming from them, or those relations should be regarded as continuing. Such an intent I do not find in the general declaration annexing the islands as

> part of the territory of the United States. That declaration, there having been no treaty, is intended to have the effect of a treaty of cession merely. It is the act whereby the islands become, in a broad sense, subject to American sovereignty. How that sovereignty will regulate their status, with regard to itself and its laws, is not thereby intended to be determined. Neither do I think that the express declaration that our land laws and certain other laws shall not apply to the islands carries the implication that other laws shall apply to them upon the principle, often misunderstood, that the expression of one thing often excludes another. On the other hand, the resolution is replete with indications that temporarily the relations of the two countries are to continue practically unchanged. Even some of Hawaii's relations with other countries are so to continue; its government is still to exist and collect its revenues; its laws are to remain in force, however at variance with our laws, and the powers—civil, judicial, and military—exercised by its officers are still to be exercised. It is, moreover, plainly apparent that Congress regards the establishment of an American government for and the extension of American laws to the islands as matters to be attended to in the future upon a consideration of the wide separation of the two countries in locality and character.

And in a later opinion (Id., 249), referring to the former opinion, he says:

> And I reach the conclusion in that opinion that Congress in respect to this and other ques-

tions has affirmatively indicated its intent that our laws (and I may now add the Hawaiian laws) are to remain generally undisturbed by the annexation of the islands until "Congress shall provide a government for such islands," or until a commission shall advise and Congress enact "such legislation concerning the Hawaiian Islands as they shall deem necessary and proper."

VII.

The construction which Congress subsequently put upon the contract by the act organizing the Territory is also very important. The title of the act is "An act to *provide* a government." This expresses the idea that a new government was to take the place of the old one. Section 2 declares:

> That the islands acquired by the United States of America under an act of Congress entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States," approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii.

The future tense is used. The islands were to be *thereafter* the Territory of Hawaii.

Section 3 declares "that a territorial government is hereby established." *Hereby—by this act—not a pre-existing thing.*

Section 4 declares:

> That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen

> hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.

Hereby declared—by this act—not a preexisting condition.

Section 5 declares:

> That the Constitution and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

This is an extension of the Constitution. There is nothing of like character in the Newlands resolution.

Section 8 declares:

> That the offices of President, minister of foreign affairs, minister of the interior, minister of finance, minister of public instruction, auditor-general, deputy auditor-general, surveyor-general, marshal, and deputy marshal of the Republic of Hawaii are hereby abolished.

Are hereby abolished—present tense—a distinct recognition of the Republic of Hawaii, with its then existing *President and* ministry (not as a sovereign nation, but as a dependency) up to the taking effect of the organic act.

Section 10 declares:

> That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed; and those in favor of or against

> the Republic of Hawaii, and not assumed by or transferred to the United States, shall be equally valid in favor of or against the government of the Territory of Hawaii. All offenses which by statute then in force were punishable as offenses against the Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this act, or shall be repealed or changed by law. * * * All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii.

"All * * * prosecutions * * * existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed." This is a plain expression of the intent and understanding of Congress that the new order of judicial proceedings should date only with the taking effect of the organic act.

Section 68 declares:

> That all the powers and duties which, by the laws of Hawaii, are conferred upon or required

> of the President or any minister of the Republic of Hawaii (acting alone or in connection with any other officer or person or body) or the cabinet or executive council, and not inconsistent with the Constitution or laws of the United States, are conferred upon and required of the governor of the Territory of Hawaii, unless otherwise provided.

Present tense again; also an intimation that some of the powers and duties by the laws of Hawaii conferred upon and required of the President and other officials of the Republic of Hawaii during the transition period might be no longer exercised under the full extension of the Constitution of the United States provided for by section 5 of the organic act.

Section 83 declares:

> That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only, in civil and criminal cases specified in said laws, are repealed, and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and 21 years of age and who can not understandingly speak, read, and write the English language shall be a qualified juror or grand juror

> in the Territory of Hawaii. No person shall be convicted in any criminal case except by unanimous verdict of the jury. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries.

This section, recognizing the old procedure as an existing legal institution, abolishes it and substitutes the common-law grand and petty jury system, providing a way in which grand jurors could be drawn.

Section 100 provides:

> That for the purposes of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.

This section, taken in connection with section 4, negatives the theory that citizens of the Republic of

Hawaii became citizens of the United States by the mere surrender of Hawaiian national sovereignty.

It seems to be clear that the Executive and Legislative branches of the Federal Government and all branches of the government of the Republic of Hawaii took the same view of the contract.

The appearance of the Federal Department of Justice in behalf of the appellant in this case demonstrates that the present Administration takes the same view of the contract that President McKinley's Administration took.

VIII.

The intent of the parties, taking the contract as a whole, and reading it in the light of local conditions, and of preceding contemporaneous and subsequent history, is clear. It must be upheld unless it violates the Constitution of the United States.

What was the Republic of Hawaii after the surrender of national sovereignty? It was neither a State nor a Territory in the American sense of the word. It was not a colony. It was a dependency. It was still known as the Republic of Hawaii. In all official correspondence with the United States it was so recognized. It had surrendered its national sovereignty absolutely and without reserve, and at the same time and by the same contract it reserved to itself its customs relations with the United States and with other foreign nations, and also its postal system—two of the most important functions usually exercised only by sovereign powers, and which can not be exercised by

any State of the American Union. It retained its own coinage and currency. It surrendered title to the public property, but on conditions that public lands and the proceeds of public lands should be forever held for the use and benefit of the people of the islands, and for the time being it retained its own system of land laws.

So far as official titles and duties were concerned the most visible change was that the American minister became presidential agent and other foreign diplomats became consuls. Not a single change was make in the personnel of officials, and they were not even reappointed, but were simply continued in office. The wheels continued to move without friction on the old tracks. All this was according to Mr. McKinley's declaration and the understanding of both parties to the contract. "Under these various provisions the government of the islands will proceed without interruption."

Now, in the light that history sheds over the whole transaction, what do the words "nor contrary to the Constitution of the United States" mean? I think they relate only to provisions applicable *ex proprio vigore*. There are no words in the Newlands resolution purporting to extend the Constitution, or any provisions thereof. There is nothing in the Newlands resolution extending any provision which did not go there of its own force as to territory subject to the dominion of the United States. Hawaii was in a transition state—a dependency—subject to the dominion of the United States, and I think the words

"nor contrary to the Constitution of the United States" were not intended to limit its powers as such, but on the contrary were words of enlargement, intended to leave it in possession, with certain specified exceptions, of all the powers the American Congress could leave it in possession of consistently with a surrender of sovereignty to the United States.

One party to the contract was a government which at that time was running smoothly, and was the evolution of a century under conditions of which the people of the United States and their representatives in Congress as a rule knew but little. The American Government has always been Hawaii's best friend. It did not intend to strike down civilization in those islands, to paralyze their courts, to inaugurate a carnival of crime, and to force honest people to appeal to "Judge Lynch." Congress could not accept a surrender of national sovereignty, and at the same time authorize its new dependency to violate the Constitution of the United States. It can not under any circumstances or anywhere authorize any violation of the Constitution, but acts inconsistent with certain provisions of the Constitution are not a violation thereof where those provisions do not apply and are not in force. Congress wanted to feel its way, to do the islands good, and not harm, and to make as few changes as possible, until it had collected sufficient information to make them intelligently. To put the meaning and intent of Congress into colloquial language it said: "This contract binds both of us. Our treaties with other

nations must be respected, and we can not authorize you to violate any provision of the Constitution of the United States which applies to you. We can not waive any provision which applies to you of its own force, but, with this understanding, go right along as you are going until we make up our minds what ought to be done." Viewed in this light the various provisions of the Newlands resolution are consistent with each other, and with the understanding of both parties.

As Mr. Justice White remarked in *Downes* v. *Bidwell*, whether certain provisions of the Constitution of the United States are applicable to the annexed territory depends upon its situation and its relations with the United States.

The status of the Republic of Hawaii, after annexation, was unique and transitory. Nothing of the kind has occurred before in the history of the United States, and probably not in the history of the world. In some respects it had far greater powers than a State of the American Union can have; in other respects its powers were less. It was a dependency. It was not yet an integral part of the United States, although it was subject to the dominion of the United States. In many respects its functions were still those of a foreign state, and it had no voice or vote in the councils of the nation, and could not speak there even in its own behalf.

From the beginning of my connection with this question I have based my opinion that the fifth and sixth amendments to the Constitution of the United

States were not applicable mainly upon the reasoning of Chief Justice Marshall in *Barron* v. *Baltimore* (7 Peters, 243). There was nothing in the text of the Constitution of the United States or in the text of the amendments in question in the slightest degree indicating or intimating that they did not apply to States as fully as to the Federal Government, but Chief Justice Marshall, in view of the history of the adoption of those amendments and of surrounding facts and circumstances, held that they were not intended to apply to States, and that, therefore, they did not apply to States.

His reasoning in this case has stood the test of seventy years. In my first brief I cited fifteen cases in which it has been reaffirmed by this court. I believe that the reasoning of this great case, so many times reaffirmed, applies with far greater force to Hawaii during the transition period than to the States themselves. In my first brief I have gone into this case at length. I do not propose to retraverse the same ground, but I do feel that the strength of my position is *Barron* v. *Baltimore*. The history of the annexation of Hawaii, and the facts and circumstances connected with it, sharply distinguish the Mankichi case from the other insular cases, and bring it within the rule of constitutional construction laid down by Chief Justice Marshall.

In my first brief and in my printed argument I tried to analyze the insular cases, together with other cases, but I found nothing, either in the majority or in the

dissenting opinions, which seems to me in conflict with the position I take before this court. The situation of Hawaii and its contract relations with the United States must be taken into account in determining whether the fifth and sixth amendments were applicable during the transition period, and when this is done the rule of construction established in *Barron* v. *Baltimore* answers the question in the negative.

I wish to suggest a further view which seems to me important. When a question involving the application or construction of the Constitution of the United States arises in a State or Territorial court, an appeal lies to this court. The Supreme Court of the United States has final jurisdiction. The fact that the supreme court of the Republic of Hawaii had final jurisdiction of all cases that properly came before it during the transition period, illustrates in the strongest light how far the status of the islands was from being that of an American Territory.

It suggests another question of such importance that the court may think it, standing by itself, decisive of the whole matter. Osaki Mankichi was convicted in a court over which this court had no appellate jurisdiction. He had a right of appeal to a higher court—the supreme court of the Republic of Hawaii, over which this court had no appellate jurisdiction. He was convicted and sentenced according to the principles of law adjudicated and settled by the supreme court of the Republic of Hawaii, not only prior to annexation, but also during the transition period. How can this court

undo the work of a court over which it had no more jurisdiction than it has over the British House of Lords? The supreme court of the Republic of Hawaii was the court of last resort, the only court to which Mankichi could have appealed. I submit that his conviction according to the interpretation of the court of last resort was a finality.

I have tried to outline the conditions and the history leading up to and culminating in the annexation of the Hawaiian Islands to the United States. From the ground gone over, it seems to me that two facts stand out plain as the sun in heaven:

First. That it was the union of two constitutional, civilized, Christian governments, sovereign nations, by voluntary contract.

Second. That at some time in the future the smaller nation should have such form of government and such legislation as the American Congress might see fit to give it; and that, in the meantime, until the situation and conditions could be reported on, and Congress informed, and a new scheme of government devised and enacted, there should be no domestic changes of a radical and disturbing nature—to quote Mr. McKinley's language, "That the government of the islands should proceed without interruption."

Neither party to the contract had the slightest suspicion that Hawaii might be left for a couple of years without legal machinery for protecting life and property. Such a status would shock the conscience of all civilized nations, and every fact and circumstance

leading up to or connected with the cession of sovereignty goes to show that both parties intended that the ordinary and necessary functions of government should continue without a break. We would not have gone to the United States upon any understanding that the Federal Government would neither protect us from our own criminal classes nor permit us to protect ourselves; and the people of the United States are too high-minded and too chivalrous to take us upon any such barbarous conditions.

A contract is the meeting of two minds; what neither party intends, what both parties plainly and beyond question intend to guard against and prevent, is not a contract. If the fifth and sixth amendments to the Constitution of the United States are to be read into the Newlands resolution, contrary to the manifest intention of both parties, then there was no meeting of minds; then the contract of annexation failed; then Hawaii, in law, continued to be an independent nation. But we do not get to this "if" if we stick to the reasoning of *Barron* v. *Baltimore*.

From a territorial point of view, this question involves the turning loose upon a small community of some twenty-five men who have been convicted of murder, manslaughter, rape, and other like crimes. In the years that have elapsed witnesses have scattered, and in most cases retrial would be a hopeless task. The case also involves the validity of most of the civil verdicts obtained in the Hawaiian Islands during a period of nearly two years, and raises a doubt whether

revenues of the Hawaiian Government, amounting to about $3,000,000, were legally collected.

Respectfully submitted.

EDMUND P. DOLE.

APPENDIX.

I submit the following extracts from the constitution of 1852, being an amplification of the constitution of 1840, and extracts from the judiciary act of 1847, in support of my statement in oral argument that for sixty years the Hawaiian Government has been a civilized and constitutional government, affording its subjects and its citizens the fundamental guaranties of civil liberty and due process of law, which are secured to American citizens by the Constitution of the United States and to Englishmen by Magna Charta.

I also submit the following extracts from the constitution of the Republic of Hawaii, showing that the fundamental principles of liberty given by the first constitutions have been maintained and enlarged. It seems to me that these exhibits are material in view of the settled rule of international law that where territory inhabited by people with enlightened institutions is annexed an interregnum of civilized government will not be permitted, and the old machinery will continue to operate until new is supplied.

EDMUND P. DOLE.

CONSTITUTION GRANTED BY HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS, BY AND WITH THE ADVICE AND CONSENT OF THE NOBLES AND REPRESENTATIVES OF THE PEOPLE IN LEGISLATIVE COUNCIL ASSEMBLED, JUNE 14, 1852.

DECLARATION OF RIGHTS.

ARTICLE I. God hath created all men free and equal, and endowed them with certain inalienable rights;

among which are life and liberty, the right of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

ART. 2. All men are free to worship God according to the dictates of their own consciences; but this sacred privilege hereby secured shall not be so construed as to justify acts of licentiousness or practices inconsistent with the peace or safety of this Kingdom.

ART. 3. All men may freely speak, write, and publish their sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

ART. 4. All men shall have the right in an orderly and peaceable manner to assemble, without arms, to consult upon the common good, give instructions to their representatives, and to petition the King or the legislature for a redress of grievances.

ART. 5. The privilege of the writ of habeas corpus belongs to all men, and shall not be suspended, unless by the King, when, in cases of rebellion or invasion, the public safety shall require its suspension.

ART. 6. The right of trial by jury, in all cases in which it has been heretofore used in this Kingdom, shall remain inviolate forever.

ART. 7. No person shall be subject to punishment for any offense, except on due and legal conviction thereof in a court having jurisdiction of the case.

ART. 8. No person shall be held to answer for any crime or offense (except in cases of impeachment, or for offenses within the jurisdiction of a police or district justice, or in summary proceedings for contempt) unless upon indictment, fully and plainly describing such crime or offense; and in the trial of any person on the charge of any crime or offense he shall have

the right to meet the witnesses who are produced against him, face to face; to produce witnesses and proofs in his own favor; and by himself, or his counsel, at his election, to examine the witnesses produced by himself and cross-examine those produced against him, and to be fully heard in his defense.

ART. 9. No person shall be required to answer again for an offense for which he has been duly convicted, or of which he has been duly acquitted, upon a good and sufficient indictment.

ART. 10. No person shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law.

ART. 11. No person shall sit as judge or juror, in any case in which his relative is interested, either as plaintiff, or defendant, or in the issue of which the said judge or juror may have, either directly or through a relative, any pecuniary interest.

ART. 12. Slavery shall, under no circumstances whatever, be tolerated in the Hawaiian Islands; whenever a slave shall enter Hawaiian territory he shall be free; no person who imports a slave, or slaves, into the King's dominions shall ever enjoy any civil or political rights in this realm; but involuntary servitude for the punishment of crime is allowable according to law.

Note: It will be noticed that the twelfth article of the constitution of 1852 antedates the thirteenth amendment to the Constitution of the United States by thirteen years. Slavery was prohibited by the constitution of the Hawaiian Monarchy at least twelve years before it ceased to exist in the United States, and, in fact, it had not existed in Hawaii since the beginning of the last century, and then only in a mild form. The contract labor law, which was abrogated by annexation, has been widely commented upon in this country as a species

of slavery; but the fact is that it was taken almost verbatim from the statutes of the United States which are in force to-day, relative to the shipment of sailors in the American mercantile marine. I am not defending the contract labor law; but, if it made the contract laborers slaves, then the laws of the United States make American sailors slaves.

ART. 13. Every person has the right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and effects; and no warrants shall issue, but on probable cause, supported by oath or affirmation, and describing the place to be searched, and the person or things to be seized.

ART. 14. The King conducts his government for the common good; for the protection, safety, prosperity, and happiness of his people; and not for the profit, honor, or private interest of any one man, family, or class of men among his subjects. Therefore, in making laws for the nation, regard shall be had to the protection, interest, and welfare, not only of the King, the chiefs, and rulers, but of all the people alike.

ART. 15. Each member of society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his proportional share to the expense of this protection; to give his personal services, or an equivalent, when necessary, but no part of the property of any individual can with justice be taken from him or applied to public uses without his own consent or that of the King, the nobles, and the representatives of the people. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

ART. 16. No subsidy, impost, duties, or tax of any description shall be established or levied, nor any

money drawn from the public treasury under any pretext whatsoever, without the consent of both branches of the legislature: *Provided*, That the legislature shall make provision, in the annual bills of appropriation, for the emergency of war, invasion, or rebellion; and the minister of finance shall render a detailed account to the legislature of any expenditure made under that provision.

ART. 17. All retrospective laws are unjust; therefore no such laws shall ever be passed.

ART. 18. The military shall always be subject to the laws of the land; and no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by the legislature.

ART. 19. All elections by the people shall be by ballot.

ART. 20. Every elector shall be privileged from arrest on election days, during his attendance at election, and in going to and returning therefrom, except in cases of treason, felony, or breach of the peace.

ART. 21. No elector shall be so obliged to perform military duty on the day of election as to prevent his voting, except in time of war or public danger.

ART. 26. No person shall ever sit upon the throne who has been convicted of any infamous crime or who is insane or an idiot.

ART. 60. The legislative power of this Kingdom is vested in the King, the House of Nobles, and the House of Representatives, each of whom has a negative on the other.

ART. 64. Each house shall be the judge of the qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day and compel the

attendance of absent members, in such manner and under such penalties as each house may provide.

ART. 65. Each house shall choose its own officers and determine the rules of its own proceedings.

ART. 69. The members of either house shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and they shall not be held to answer for any speech, or debate, made in the house, in any other court or place whatsoever.

ART. 76. The representation of the people shall be based on the principle of equality, and shall be forever regulated and apportioned according to the population, to be ascertained by the official census.

ART. 77. No person shall be eligible for a representative of the people who is insane or an idiot, or who shall at any time have been convicted of any infamous crime, nor unless he be a male subject or denizen of the Kingdom, who shall have arrived at the full age of twenty-five years; who shall know how to read and write, who shall understand accounts, and who shall have resided in the Kingdom for at least one year immediately preceding his election.

ART. 78. Every male subject of His Majesty, whether native or naturalized, and every denizen of the kingdom who shall have paid his taxes, who shall have attained the full age of twenty years, and who shall have resided in the kingdom for one year immediately preceding the time of election, shall be entitled to one vote for the representative or representatives of the district in which he may have resided three months next preceding the day of election; provided, that no insane person, nor any person who shall at any time have been convicted of any infamous crime within this

kingdom, unless he shall have been pardoned by the King, and by the terms of such pardon been restored to all the rights of a subject, shall be allowed to vote.

ART. 79. All bills or resolves for raising the revenue or calling for any expenditure of the public money shall originate in the house of representatives; but the house of nobles may propose or concur with amendments, as on other bills.

ART. 80. The house of representatives shall be the grand inquest of the Kingdom, and all impeachments made by them shall be heard and tried by the house of nobles.

ART. 81. The judicial power of the Kingdom shall be vested in one supreme court and in such inferior courts as the legislature may from time to time establish.

ART. 82. The supreme court shall consist of a chief justice and two associate justices, any of whom may hold the court. The justices of the supreme court shall hold their offices during good behavior, subject to removal upon impeachment, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Provided, however, that any judge of the supreme court, or of any other court of record, may be removed from office for mental or physical inability by a concurrent resolution of two-thirds of both branches of the legislature. The judge against whom the legislature may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either branch of the legislature shall act thereon.

ART. 84. The judicial power shall extend to all cases in law and equity arising under the constitution, any law of this Kingdom, and treaties made, or which shall

be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction.

ART. 86. The chief justice of the supreme court shall be the chancellor of the Kingdom; he shall be ex officio president of the house of nobles in all cases of impeachment, unless when impeached himself; and exercise such jurisdiction in equity or other cases as the law may confer upon him, his decisions being subject, however, to the revision of the supreme court on appeal.

ART. 87. The decisions of the supreme court, when made by a majority of the justices thereof, shall be final and conclusive upon all parties.

ART. 88. The King, his ministers, the governors, and each branch of the legislature, shall have authority to require the opinions of the justices of the supreme court upon important questions of the law, and upon solemn occasions.

ART. 94. The King, after approving this constitution, shall take the following oath: I solemnly swear, in the presence of Almighty God, to maintain the constitution of the Kingdom whole and inviolate, and to govern in conformity with that and the laws.

ART. 98. No person shall ever hold a seat in the legislature, or any office of honor, trust, or profit under the government of the Hawaiian Islands who shall, in due course of law, have been convicted of theft, bribery, perjury, forgery, embezzlement, or other high crime or misdemeanor.

ART. 99. No officer of this government shall hold any office, or receive any pension or salary, from any other government or power whatever.

ART. 102. To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every

law shall embrace but one object, and that shall be expressed in the title.

ART. 105. Any amendment or amendments to this constitution may be proposed in either branch of the legislature, and if the same shall be agreed to by a majority of the members of each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the next legislature; which proposed amendment or amendments shall be published for three months previous to the election of the next house of representatives; and if, in the next legislature, such proposed amendment or amendments shall be agreed to by two-thirds of all the members of each house, and be approved by the King, such amendment or amendments shall become part of the constitution of this Kingdom.

THE JUDICIARY ACT OF 1847.

In 1847 a well considered and statesmanlike act was passed to organize the judiciary department of the Hawaiian Islands. It was the work of Chief Justice Lee. It was revised and redrawn in 1853. With minor changes it continued in force until the judiciary act of 1892, drawn by Mr. Sanford B. Dole, then one of the justices of the supreme court. Although the judiciary act of 1892 made substantial changes, and the organic act of 1900 made changes still more radical, a great part of this original act of 1847 is still in force.

Section 2 of Chapter I of said act declared that:

"Said department, and the several judges and other judicial officers connected therewith, shall be distinct from, and in all respects independent of, the executive department organized and authorized by the first and

second organic acts to which this act refers. The King, in his executive capacity, shall in no case control the judgments, decisions, and awards made or sanctioned by or before any of the said judges and judicial officers, neither shall he have authority to overrule the judgments, decisions, or awards so made or sanctioned, except as chief judge of the supreme court, a majority of said court concurring with him in opinion: Provided, however, that nothing herein contained shall be construed to prevent His Majesty, as executive head and chief magistrate of the Kingdom, from pardoning at pleasure, any person offending against the laws, after final conviction in any of the said courts: And further provided, that nothing herein contained shall prevent the executive branch in any matter criminal or civil, in which this Government is concerned as a party, plaintiff, or prosecutor, from withdrawing its suit, or from entering nolle prosequi, as contemplated in the fifth part of an act entitled 'An act to organize the executive department of the Hawaiian Islands.'"

Section 3 of Chapter I of this act declared that: "The principles of the Hawaiian constitution, and the prescriptions of an act entitled, An act to organize the executive ministry; of an act entitled, An act to organize the executive departments; of this act, of the civil code, of the criminal code, and of the laws, ordinances, and decrees heretofore passed and enacted, which have not been repealed by constitutional authority, and those hereafter to be enacted, shall be the measure of all judgments, awards, and decisions of the several judicial officers and courts created by this act. They shall have judicial regard to the rights vested and acquired by the government, and by private individuals, under any law, ordinance, or decree constitu-

tionally and legally passed and promulgated, which may afterwards have been repealed, and shall as to such vested and acquired rights, consider such law as still in force for judicial purposes. Being the courts of record, they shall determine for themselves the constitutionality and the binding effect of any law, ordinance, or decree passed, enacted, or put forth by the Nobles and Representatives under the approval of His Majesty, and of all orders in council, circular letters, patents, standing instructions, executive rules, ordinances, and decrees by His Majesty put forth through any of his executive departments or officers, with or without the sanction of his privy or cabinet councils. They shall have power judicially, being courts of record, to declare void or null any such act, ordinance, order, or decree, patent letter or instruction as may upon mature consideration appear to them contrary to the constitution, opposed to the vested and acquired rights of individuals, to the law of nature and of nations, and to subsisting treaties with any foreign power. They shall adjudge and determine the validity of all considerations founding either public or private obligations, contracts, and agreements, national, international, or personal. Being courts of record, they shall administer the comity of nations, and take notice as matters of fact, of the laws of foreign countries. They shall have jurisdiction to determine all controversies in which this Government is a party plaintiff, prosecutor, or defendant; or arising between private parties, relating to actions sounding in tort, to personal wrongs or chattels, or affecting the title to, or possession of land and tenements: Provided always, that nothing herein contained shall be so construed as to interfere with the rights and jurisdiction of the board

of commissioners to quiet land titles. They shall have jurisdiction to try and determine all crimes and misdemeanors, and to inflict the sentences annexed thereto by law."

Section 23 of article 2 of Chapter II of said act provided that: "In all cases of arrest for crimes or for misdemeanors cognizable before a jury, the magistrate in whose jurisdiction or on whose warrant the accused was arrested, shall, upon the bringing up of such accused, proceed to consider whether there is probable cause to believe that a jury of the circuit or superior court would, upon the evidence adduced, convict the accused of the crime or misdemeanor charged against him. Said justice shall reduce to writing, in substance, the evidence so elicited on examination, with the respective names of the witnesses, and if in his opinion the testimony do not warrant commitment for trial, he shall release the prisoner, entering that fact upon the criminal docket to be kept at his office; but if in his opinion there should be probable cause to believe that upon the evidence produced to him conviction would take place before a jury, he shall make out, sign, and deliver to the constable by whom the accused was arrested a mittimus."

Section 24 of article 2 of Chapter II of said act provided that "The failure to find a bill against any accused person at the next circuit or superior court, or having found such bill, the failure to prosecute the same at the ensuing circuit or superior court, unless the court postponed the same for good reasons, or failure to sustain such bill upon any of the charges therein preferred, or a verdict of not guilty to all the counts therein set forth, or the successive disagreement of two juries empaneled to try the same, shall operate as an acquittal of the accused, and as a supersedeas of the

power of the marshal, the sheriff or his deputy, longer to detain the said accused in custody upon the allegations for which he was originally committed."

Section 4 of Chapter III of article 2 of said act provided that "The salaries of the judges of the superior court of law and equity shall be fixed by the King and privy council at the time of their appointment, and shall not be diminished during their term of office."

Section 6 of Chapter IV of article 2 of said act provided that "Full latitude of examination and cross-examination of witnesses, and of debate and advocacy, shall be allowed to the accused in all criminal causes by the court"

Section 7 of Chapter IV of article 2 of said act provided that "In all cases in which an accused or indicted offender is unable to employ counsel for his defense, the court shall have power to assign him such counsel from the licensed practitioners at its bar, who shall use every lawful exertion in his behalf, without fee or reward, upon pain of contempt to the court."

Section 8 of Chapter IV of article 2 of said act provided that "The verdict of the jury, or as the issue may happen to be, the decision at bar, subject to arrest of judgment, shall found the sentence to be passed in open court by the judge, pursuant to the prescriptions and penalties of the law charged and found to have been violated, subject to the executive clemency, and subject to motion in arrest of execution for cause."

Section 9 of Chapter IV of article 2 of said act provided that: "Any judge of a court of record may, for cause shown to his satisfaction, respite any convicted criminal for any length of time sufficient for the purposes of mercy, or not to work injury to innocent third parties."

Section 10 of Chapter IV of article 2 of said act provided that: "No person at the time insane, and no woman at the time enciente, shall suffer capital punishment; neither shall any child suffer capital punishment who has not evinced a knowledge of the distinction between right and wrong."

Section 11 of Chapter IV of article 2 of said act provided that: "In all cases in which the law of this kingdom awards the punishment of death, there shall always intervene at least forty-eight hours between the conviction and the sentence, and at least fourteen days between the sentence and the execution."

Article 4 of Chapter IV of said act provided for trials by jury. There were no counties, and are none to the present day. The islands were divided into districts and circuits, which, for judicial purposes, amounted to the same thing. The jurors were summoned from the grand body of the circuit, and the panels were drawn by lot with challenges for cause, and peremptory challenges, in all essential respects as in the United States. Native juries tried civil suits between natives, and criminal cases in which natives were defendants. Foreign juries tried civil suits between foreigners, and criminal cases in which persons of foreign blood were defendants. The provision in regard to mixed cases was:

"In all jury cases in which one party is a foreigner and the other a native, the jury shall be composed of an equal number of natives and foreigners (naturalized or unnaturalized), who shall be drawn alternately from the boxes containing the names of such foreigners and natives as have been summoned to attend the court convened for the trial of such cases." This provision in regard to native, foreign, and mixed juries remained unchanged for fifty-three years.

Section 21 of article 4 of Chapter IV of said act provided that "No jury for the trial of any civil or criminal case shall be less than twelve in number; but when any nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve." This provision, passed in 1847, was the law of the land when the islands were annexed to the United States.

CONSTITUTION OF THE REPUBLIC OF HAWAII.

RIGHTS OF PERSON AND PROPERTY.

ARTICLE 1.—*Rights of the person.*

SECTION 1. God hath endowed all men with certain inalienable rights, among which are life, liberty, and the right of acquiring, possessing, and protecting property, and of pursuing and obtaining happiness.

SEC. 2. The Government is conducted for the common good, and not for the profit, honor, or private interest of any one man, family, or class of men.

SEC. 3. The legislature may provide law, however, for the supervision, registration, control, and identification of all persons, or any class or nationality of persons; and may also by law restrict and limit the term of residence, and the business or employment of all persons or of any class or nationality of persons coming into the Republic.

ARTICLE 2.—*Religious freedom.*

All men are free to worship God according to the dictates of their own consciences; but this privilege shall not be so construed as to justify acts of licentiousness or practices inconsistent with the peace or safety of the Republic.

ARTICLE 3.—*Freedom of speech and of the press.*

All men may freely speak, write, and publish their sentiments on all subjects; and no law shall be enacted to restrain the liberty of speech or of the press; but all persons shall be responsible for the abuse of such right. Provided, however, that the legislature may enact such laws as may be necessary, to restrain and prevent the publication of public utterance of indecent or seditious language.

ARTICLE 4.—*Meeting and petition.*

All men shall have the right to assemble in an orderly and peaceable manner, without arms, to consult upon the common good and to petition the President or legislature for redress of grievances.

ARTICLE 5.—*Writ of habeas corpus.*

The privilege of the writ of habeas corpus belongs to all men, and shall not be suspended, except by the President or by one of the cabinet ministers as herein provided, when in case of rebellion or invasion, or imminent danger of rebellion or invasion, the public safety shall require its suspension.

Provided, however, that no alien unlawfully entering the Republic shall be entitled to this writ as of right.

ARTICLE 6.—*Right of trial.*

SECTION 1. No person shall be subject to punishment for any offense except on due and legal conviction thereof by a tribunal having jurisdiction of the case.

SEC. 2. Except in case of impeachment or offenses within the jurisdiction of a district magistrate, or in summary proceedings for contempt, no person shall

be held to answer for any offense except upon indictment, information, or complaint, describing such offense; and he shall in all cases have the right to meet the witnesses who are produced against him, face to face; to produce witnesses and proofs in his own favor; and by himself or his counsel, at his election, to examine the witnesses produced by himself and cross-examine those produced against him, and to be heard in his own defense.

SEC. 3. Subject to such changes as the legislature may from time to time make in the number of jurors for the trial of any case, and concerning the number required to agree to a verdict and the manner in which the jury may be selected and drawn, and the composition and qualifications thereof, the right of trial by jury in all cases in which it has been heretofore used, shall remain inviolable except in actions for debt or assumpsit in which the amount claimed does not exceed one hundred dollars, and such offenses less than felonies as may be designated by law.

And provided that no capital case shall be tried by a jury of less than twelve men.

The jury may be waived in all civil cases under such conditions as may be prescribed by law, and by defendants in all criminal cases except capital.

ARTICLE 7.—*Previous conviction or acquittal.*

No person shall be required to answer for any offense identical both in law and fact with an offense of which he has been duly convicted or of which he has been duly acquitted.

ARTICLE 8.—*Privilege of accused.*

No person shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law.

ARTICLE 9.—*Slavery.*

Involuntary servitude, except for crime, is forever prohibited in this Republic. Whenever a slave shall enter the territory of this Republic he shall be free.

ARTICLE 10.—*Security from search and arrest.*

Every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers and effects; and no warrant shall issue except on probable cause, supported by oath or affirmation and describing the place to be searched and the persons or things to be seized.

ARTICLE 11.—*Taxing and appropriating power.*

SECTION 1. No subsidy, duty, or tax of any description shall be established or levied without the consent of the legislature; nor shall any money be drawn from the public treasury without such consent, except in the manner directed by this constitution.

SEC. 2. Each member of society has the right to be protected in the enjoyment of his life, liberty, and property according to law; and therefore he shall be obliged to contribute his portion or share to the expense of this protection; and to give his personal services or an equivalent when necessary, as may be provided by law.

ARTICLE 12.—*Eminent domain.*

Private property may be taken for public use, and private rights of way may be obtained across the lands of others for railways, drains, flumes, water-pipes, and ditches for agricultural, milling, manufacturing, mining, domestic, or sanitary purposes; but only upon due process of law and just compensation.

Public use shall include such purposes as shall be required or designated by treaty stipulations between the Republic of Hawaii and any other nation.

ARTICLE 13.—*Military subject to law.*

SECTION 1. The military shall always be subject to the laws of the land.

SEC. 2. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner prescribed by the legislature.

Articles 14 to 81, inclusive, relate to the form and name of the government, the territory included therein, the ensign of the Republic, citizenship, special rights of citizenship, naturalization, denization, the executive power, the qualifications of the President, the method of election, his salary, his powers of appointment and of removal, convening of the legislature, receiving foreign representatives, messages to the legislature, suspension of the writ of habeas corpus in cases of rebellion or invasion, treaties with foreign countries, military powers, the cabinet, the acting President in case of death or disability of the President, the legislature, the action of members thereof, qualifications, oaths of office, method of voting, quorum, punishments for contempt of legislature, compensations of members, punishment of members, exemption from liability for words spoken in debate, exemptions from arrest while attending the legislature, like provisions in regard to the Senate, methods of legislation, veto of the President, appropriations, conduct of elections, registration of voters, and council of state.

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ART. 82. The judicial power of the Republic shall be vested in one supreme court, and in such inferior courts as the legislature may from time to time establish.

ARTICLE 83. *Supreme court—impeachment—removal.*

SECTION 1. The supreme court shall consist of a chief justice and not less than two associate justices. Provided, however, that in case of the disqualification or absence of any justice thereof in any cause pending before the court his place for the trial and determination of said cause shall be filled as provided by law.

SEC. 2. The justices of the supreme court shall hold their offices during good behavior, subject to removal upon impeachment, and shall receive for their services a compensation which shall not be diminished during their continuance in office: Provided, however, that any justice of the supreme court, or a judge of any other court of record, upon recommendation of the executive council, may be removed from said office on a resolution passed by two-thirds of all the elective members of the legislature sitting together.

SEC. 3. The justice or judge against whom the legislature may be about to proceed shall have notice thereof, accompanied by a copy of the causes alleged for his removal, at least ten days before the day on which the legislature shall act thereon. He shall be heard before the legislature.

ARTICLE 84.—*Supreme and inferior courts.*

The judicial power shall be divided among the supreme court, the justices thereof, and the several inferior courts of the Republic in such a manner as the legislature may, from time to time, prescribe; and the tenure of office of the judges of the inferior courts

shall be such as may be fixed by the law creating them.

ARTICLE 85.—*Jurisdiction.*

The judicial power shall extend to all cases in law and equity, arising under the constitution and laws of the Republic, and treaties; to all cases affecting public ministers and consuls, and to all cases of admiralty and maritime jurisdiction.

ARTICLE 86.—*Decisions.*

The decisions of the supreme court shall be final and conclusive upon all parties, when made by a majority of the justices thereof or by a majority of those who constitute the court as provided by law in case a justice thereof is disqualified or absent.

ARTICLE 87.—*Opinions to the executive.*

The justices of the supreme court, when requested by the President or the Cabinet, shall render opinions upon questions of law upon solemn occasions.

ARTICLE 88.—*Disqualification by previous judgment.*

No judge or magistrate shall sit on an appeal or new trial in any case in which he may have given a previous judgment.

ARTICLE 89.—*Disqualification by relationship or pecuniary interest.*

No person shall sit as a judge or juror in any case in which his relative by affinity, or by consanguinity within the third degree, is interested, either as plaintiff or defendant, or in the issue of which the said judge or juror may have, either directly or through such relative, any pecuniary interest.

ARTICLE 90.—*Impeachment.*

SECTION 1. The President and all civil officers of the Republic shall be liable to removal from office on impeachment by the house of representatives upon any of the following grounds, namely:

Any act or negligence involving moral turpitude punishable by law as an offense and committed while in office, incapacity for the due performance of official duty, maladministration in office, and assessment of officeholders for partisan or political expenses.

SEC. 2. The senate shall be a court, with full and sole authority to hear and determine all impeachments made by the house of representatives.

SEC. 3. The chief justice of the supreme court shall be ex officio president of the senate in all cases of impeachment, unless when impeached himself. Should the chief justice be impeached, some person specially commissioned by the President shall preside over the senate during such trial.

SEC. 4. Previous to the trial of any impeachment the senators shall respectively be sworn truly and impartially to try and determine the charge in question according to the law and the evidence.

SEC. 5. The judgment of the senate, in case of the conviction of the person impeached, shall not extend further than to removal from office and disqualification to hold any place of honor, trust, or profit under the Republic; but the person so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment according to law.

Then follow miscellaneous provisions in regard to existing statutes and offenses, officeholders, treaties, bonds, etc., crown lands, majority rule, prohibiting aid to sectarian or private schools, prohibiting lotteries, prohibiting Government officers from holding office or taking pay from any other government, etc.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE TERRITORY OF HAWAII, APPELLANT,
v.
OSAKI MANKICHI.
} No. 219.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

POINTS MADE IN ORAL ARGUMENT BY THE SOLICITOR-GENERAL, WITH APPENDIX CONTAINING TREATY, RESOLUTION, AND ORGANIC ACT.

DATES.

June 16, 1897, Treaty of Annexation negotiated. (See Appendix.)

July 7, 1898, Resolution of Annexation approved (30 Stat., 750). (See Appendix.)

August 12, 1898, Transfer of Sovereignty.

November 4, 1898, *Edwards* case decided (11 Haw. Rep., 571), holding Fifth and Sixth Amendments not in force in Hawaii.

March 26, 1899, crime committed (Rec., p. 3).

May 4, 1899, indictment found (Rec., p. 9).

May 18, 1899, defendant found guilty (Rec., p. 7).

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April 30, 1900, an act "To provide a Government for the Territory of Hawaii," passed (31 Stat., 141). (See Appendix.)

June 14, 1900, the Organic Act takes effect and Territorial Government is organized.

August 26, 1901, petition for habeas corpus filed in United States circuit court.

I.

At the time of the cession the Hawaiian Islands constituted a sovereign and independent nation, with a government of its own, republican in form, and a civilized system of law, civil and criminal, defining rights and affording remedies. The courts were open and due process of law provided. The system of jurisprudence had been framed and put in operation largely by Americans. It was believed to be adapted to the nature and needs of the inhabitants of the islands. The distinction between the native and foreign element was recognized in the law. There was a jury system, but racial lines were drawn. A native Hawaiian was entitled to be tried by a jury of native Hawaiians, and a foreigner by a jury of foreigners. Naturally, in view of this distinction, grand juries drawn from the body of the people were not used. As far back as 1847 the prosecution of all offenses devolved upon the attorney-general, who prepared indictments, which were certified by the judge.

In adopting this method of indictment and trial the Hawaiian people only did what the people of many of our States, particularly those in the West, have done,

and what any of them may do under our Constitution. This court has held so over and over again.

> The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. *Subject to the limitations heretofore named*, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. (Mr. Justice Brewer in *Brown* v. *New Jersey*, 175 U. S., 171, 175.)

"It appears to us," said Mr. Justice Peckham in *Maxwell* v. *Dow* (176 U. S., 581, 604), "that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves. * * * *It is emphatically the case of the people by their organic law, providing for their own affairs*, and we are of opinion they are much better judges of what they ought to have in these respects than anyone else can be."

Or, as Mr. Justice Brown, speaking for the court in *Bolln* v. *Nebraska* (176 U. S., 83), said, page 88:

> As we have repeatedly held, the fourteenth amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform *to the wishes of their citizens*, to changed views of administration, or to the exigencies of their social life.

For provisions of various State constitutions respecting indictment by grand jury and trial by petit jury, see Annotated Constitution of New York (1894), pages 24, 62.

II.

But it is urged that the right to be indicted by a grand jury and convicted only by the unanimous verdict of a petit jury is fundamental, and can not be denied without violating the Constitution of the United States. If this were so, this court would never have laid down the doctrine adhered to in a line of decisions from *Hurtado* v. *California* (110 U. S., 516) to *Maxwell* v. *Dow* (176 U. S., 581), because the fourteenth amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law." It was upon the ground they are fundamental that Mr. Justice Harlan dissented in these cases. If they are fundamental, this amendment would protect them against denial or impairment by any authority, State or Federal. Mr. Justice Brewer pointed this out in *Brown* v. *New Jersey* (175 U. S., 172), saying, page 175:

> The State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.*

After pointing out that the specific and applicable provisions of the Constitution relating to indictment by a grand jury and trial by a petit jury applied only to the Federal courts, he necessarily held that the rights of indictment by a grand jury and trial by a common-law petit jury are not fundamental, and therefore may be abolished.

III.

Such being the situation, the Hawaiian Republic submitted a proposition of cession. There were certain conditions attached to this. Did Congress have power to accept the cession upon condition? If it were doubtful before, whether we may take territory *sub modo* and upon conditions, it is not now, since the decision of the Insular Tariff cases.

Chief Justice Marshall said in the *Canter case* (1 Pet., 541) that acquired territory "becomes a part of the nation to which it is annexed either *on the terms stipulated in the treaty of cession*, or on such as the new master shall impose." And Mr. Justice Gray in his concurring opinion in *Downes* v. *Bidwell* (182 U. S., 244) said, bottom page 346:

> If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to *all* the restrictions of the Constitution.

IV.

Such being the situation in Hawaii and such the power of Congress, the Hawaiian Republic proposed

to cede the islands to this country upon certain terms and conditions set forth in a treaty (printed in the appendix). This treaty was negotiated, signed by Secretary Sherman, but never approved or ratified, because Congress, after consideration, deemed it best to follow the plan pursued in the case of Texas and annex by joint resolution. This was done. The resolution contains the precise terms and conditions set forth in the proposed treaty. The question for consideration is therefore one of construction. What was the intention of the parties to the cession as expressed in the resolution? In determining this, we may look at the existing conditions, weigh the language used, consider the construction placed on it by both governments, and the view Congress evidently took of it in passing the organic act.

V.

Of course the presumption is that the government of Hawaii in offering to cede the islands, and Congress in accepting this proposition and annexing them, intended that the existing government of the islands should continue without interruption until another could be provided by Congress. To enable Congress to act intelligently it was necessary that representatives of both governments should look into the situation and report to Congress what changes were necessary and proper. It was not known how long it would take to do this. It was believed a short time only would be required. It was not known how this annexed territory ought to be or would be governed by the United States, whether

as a dependency, a Territory, or a State. In 1854 a treaty of annexation was negotiated which provided for the incorporation of the Hawaiian Islands into the American Union as a State. If so incorporated, the existing system of procedure, civil and criminal, might be continued, without denying any right under the Constitution of the United States.

In *Holden* v. *Hardy* (169 U. S., 366), Mr. Justice Brown, speaking for the court, said, page 389:

> In the future growth of the nation, as heretofore, it is not impossible that *Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged.* It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants, a jurisprudence with which they had had no previous acquaintance or sympathy.

In view of all this, I submit the presumption is that both parties to the arrangement for annexation intended the civil and criminal procedure that had been in use for more than half a century should continue until Congress could act intelligently upon the matter, determining whether, in the organic act, existing methods should be preserved, or, if modified, in what particulars. *It is not to be presumed that it was intended to tear down the old house before it was even known a new one would be needed.*

VI.

The resolution of annexation reads:

> Whereas the Government of the Republic of Hawaii *having, in due form, signified its consent,* in the manner provided by its Constitution—

This refers to the treaty of annexation, negotiated in 1897—

> to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings, etc.: Therefore,
>
> *Resolved, etc.*, That said cession—

Of course the word "cession" is inaccurately used; it was really a proposition to cede—

> That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States—

Not as a part of the United States, but as "a part *of the territory of the United States;*" in other words, a possession of the United States—

> And are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

This completes the broad language of the section which annexed the Hawaiian Islands and subjected

them to the sovereignty of the United States. The remaining paragraphs of the resolution set forth certain terms and conditions annexed to the offer of cession by the Republic of Hawaii, which the United States accepted and was in honor bound to observe, and did observe.

The first related to the public lands of Hawaii:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, *shall be used solely for the benefit of the inhabitants of the Hawaiian Islands* for educational and other public purposes.

The next paragraph provides for the continuance of the existing Government without interruption:

> Until Congress shall provide for the government of such islands, *all the civil, judicial, and military powers exercised by the officers of the existing government* in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

It is to be observed that this is not a provision by Congress for a government for the islands; it looks

forward to the time when Congress may intelligently provide a government, and, until that time, it continues the existing government without interruption. This is the answer to the contention that the resolution of annexation is in itself an organic act providing a government for Hawaii by applying the laws then in force, except those contrary to the Constitution of the United States, etc.

It is to be noted that only "the civil, judicial, and military powers exercised" are to continue until Congress shall provide for the government of the islands. The word "legislative" is purposely omitted. And this is explained by the provision in the next paragraph that—

> *The municipal legislation* of the Hawaiian Islands (with certain named exceptions) *shall remain in force* until the Congress of the United States shall otherwise determine.

Used in a broad sense, "civil" may cover and include legislative, executive, and judicial powers. But the express provision respecting the legislative power, coupled with the subsequent provisions that the municipal legislation of the islands should continue in force, make it clear that it was not the intention that there should remain in Hawaii, during the transition period, any legislative power to change the existing municipal law, pending the action of Congress. And this conclusion is confirmed by the subsequent provision authorizing the President to appoint five commissioners, at least two of whom should be residents of the Hawaiian Islands, "who shall, as soon as reasonably

practicable, *recommend to Congress such legislation* concerning the Hawaiian Islands *as they shall deem necessary or proper.*"

So this was the scheme, that the existing government was to be continued without interruption in its exercise of civil, judicial, and military power, but not in its exercise of legislative power. The municipal legislation of the islands was to remain in force until Congress, upon the report of the Commissioners, should see fit to change it.

If Congress had intended to use the word "civil" in the broad sense, it would not have used the word "judicial." Civil and military powers would have covered the entire field.

VII.

Along with the provisions continuing the existing government are certain special provisions: The first abrogating the treaties of the Hawaiian Islands and substituting those of the United States; the second providing for the continuance of the existing customs regulations of the islands with the United States and other countries; the third providing for the assumption of the public debt of the islands by the United States with the proviso that so long as the existing government and the present commercial relations of the Hawaiian Islands are continued the government shall continue to pay the interest on the debt, and the fourth forbidding any further immigration of Chinese into the islands or the passage of any Chinese from the islands to the United States.

With reference to these special provisions, it was asked during the argument, "Why provide that the customs laws shall not extend there, unless, without this provision, they would extend there?"

But the provision is, not that the customs laws shall not extend there, but that the existing customs relations shall remain unchanged, until Congress shall extend the customs laws there.

And, putting a similar question about another provision, "Why provide that the existing treaties of the Hawaiian Islands shall cease and determine and our treaties be substituted, unless, without this provision, the Hawaiian treaties would remain in force, notwithstanding the cession of the islands, the transfer of sovereignty, and the extinction of the Republic of Hawaii as an independent nation?"

If it be contended that the special provisions respecting the public lands, the public debt, the customs and commercial relations of the islands, and the Chinese show that Congress understood that without these the Constitution and laws of the United States would have been extended to the island *in toto*, it may with equal force be asserted that the treaty provision shows that Congress understood that without it, notwithstanding the cession and transfer of sovereignty, the Republic of Hawaii would continue an independent nation retaining its treaty relations with the powers of the earth.

In point of fact, the special provisions were designed to make explicit the agreement of the two governments

on essential points. But they have not served to remove all doubt, as witness the Crossman case and this one.

VIII.

In my brief I stated that the provision, "no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands," is inconsistent with the view that Congress intended by the resolution of annexation to incorporate the islands as an integral part of the United States; and counsel calls attention to the provision in the organic act to the effect that "no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Terrritory, or district of the United States from the Hawaiian Islands," contending that, by parity of reasoning, this provision shows that it was not the intention of Congress, by the organic act, to incorporate the islands or extend the Constitution over them. But there is a distinction between Chinese who were citizens of the Hawaiian Islands and Chinese laborers who were aliens, and there only by sufferance. I had in mind those Chinese who were citizens of Hawaii, and the point I made was that if the resolution of annexation incorporated these islands as an integral part of the United States, their citizens would become citizens of the United States with the right of free passage from one portion of the United States to another. Of course aliens here by license only may be sent out of the country or restricted to whatever part of it Congress may deem expedient.

IX.

I now come to the positive provision:

> The municipal legislation of the Hawaiian Islands * * * shall remain in force until the Congress of the United States shall otherwise determine.

Where I have placed the stars were inserted the following qualifying clauses, each of which follows naturally and irresistibly from other provisions of the resolution:

(*a*) "Not enacted for the fulfillment of the treaties so extinguished;"

Obviously such legislation fell with the treaties.

(*b*) "Not inconsistent with this joint resolution;"

Because the resolution contained certain provisions inconsistent with the existing law of Hawaii; for example, that relating to the Chinese.

(*c*) "Not contrary to the Constitution of the United States;"

Because by the cession the islands became subject to the dominion of the United States, and there are certain limitations of the Constitution which apply wherever the jurisdiction of the United States extends; and

(*d*) "Nor to any existing treaty of the United States;"

Because the resolution substituted these treaties for the Hawaiian treaties.

It is to be observed that these qualifying clauses flow from and rest on the positive provisions of the

resolution. They recognize a change in conditions owing to the positive provisions. They are not positive themselves; they do not change conditions; they simply recognize conditions as changed because of the provisions which are positive.

X.

Counsel contends that the purpose and effect of the qualifying words "not contrary to the Constitution of the United States" was to extend the Constitution, with all its limitations, to the Hawaiian Islands. He says these words are equivalent to those used in the organic act of Utah, and he relies upon certain cases in which the court has held that when Utah was a Territory its inhabitants were entitled to be indicted by a grand jury and tried by common-law petit jury. But the act of September 9, 1850 (9 Stat., 453), "to establish a Territorial government for Utah," provided:

> SEC. 17. That the Constitution and laws of the United States *are hereby extended over and declared to be in force in* said Territory of Utah, so far as the same, or any provision thereof, may be applicable.

This is the equivalent, not of the qualifying clause in the resolution of annexation, but of the positive provision in the organic act of the Hawaiian Islands, where it is provided—

> SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, *shall have the same force and effect within the said Territory as elsewhere in the United States.*

I concede that by this latter provision the Constitution was for the first time extended to these islands, but I submit that the use of the qualifying clause was merely a recognition of that fact that by the cession and transfer of sovereignty there were certain limitations of the Constitution, preservative of fundamental rights, which became applicable, and necessarily, if there were any of the municipal legislation of the islands inconsistent with these applicable limitations, they became null and void and could not remain in force.

XI.

I have already, both in printed briefs and oral arguments, called attention to the character of those limitations which are applicable wherever the sovereignty of the United States extends. It is unnecessary to repeat what I have said as clearly as I could, or to refer the court to the language of Mr. Justice Brown and Mr. Justice White in their opinions in the *Downes case* to the effect that there are fundamental rights and principles, the basis of all free government, which can not with impunity be transcended, although the territory has not been incorporated into the United States. And this is doubtless what Mr. Justice Harlan, speaking for the court, referred to in *McAllister* v. *United States* (141 U. S., 174), when he said (p. 188):

> How far the exercise of that power [the power of Congress to govern the Territories] is restrained by *the essential principles upon which our system of Government rests*, and which are embodied in the Constitution, we need not stop

to inquire, though we may repeat what was said in *Mormon Church* v. *United States* (136 U. S., 1, 44): "Doubtless Congress, in legislating for the Territories, would be subject to *those fundamental limitations in favor of personal rights* which are formulated in the Constitution and its amendments; *but these limitations would exist rather by inference and the general spirit of the Constitution*, from which Congress derives all its powers, than by any express and direct application of its provisions.

XII.

Both the Hawaiian Government and the Government of the United States construed the resolution as providing that the existing government should continue without interruption in the exercise of its civil, judicial, and military powers. The existing municipal legislation was regarded as remaining in force. No legislative power for the purpose of changing the existing municipal legislation was exercised during the transition period. The legislature was not in session when the transfer of sovereignty took place. It would not have met for eighteen months, and before that time it was prorogued by President McKinley.

Necessarily, in the protection of life and property, criminals were indicted and tried as they had been. The judicial powers of the Republic of Hawaii, which were continued in force by express provision of the resolution, included the power, by the trial court, to indict and try criminals in the manner provided by existing law, and the judicial power by the supreme

court of the islands to determine finally and conclusively whether the criminal had been legally convicted.

In the *Edwards* case, decided in November, 1898 (11 Haw. Rep., 571), the supreme court of Hawaii passed upon the question whether the fifth and sixth amendments applied within the islands, and after a careful scrutiny of the provisions of the resolution, held they did not. There was no provision at that time for the review of the finding of that court by this court. That court was the final court, and I submit that its decision as to what was law in Hawaii during the transition period must be regarded as final. That was one of the judicial powers continued without interruption, the power of the supreme court of the Hawaiian Islands to determine finally what was law in those islands.

XIII.

But it is insisted that the common law of England was in force in the islands under the Republic, and that, exercising rights under that, the courts of Hawaii might have summoned grand juries, subpœnaed witnesses before them, and required a unanimous verdict of the trial jury to convict. It is true that the civil code of 1897 of the islands makes the common law of England the common law of the islands, with certain exceptions. This is the provision:

> SEC. 1109. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, *except as otherwise expressly provided by the Hawaiian constitution or*

> *laws*, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, *provided, however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.*

And this was the reason why the supreme court of Hawaii, in the *Edwards case*, said:

> A complete answer to these propositions is that *there is no Hawaiian statute authorizing a grand jury or requiring unanimity of the jury* in their verdicts, and to adopt these provisions in our criminal procedure without a statute authorizing them would violate the letter of the Newlands resolution, which continues our laws and does not make new ones for us.

Under the law of Hawaii no man could be put on trial until he had been indicted by the attorney-general of the Republic and this indictment was certified by the judge of the court. A provision of this kind may protect a man more than to place him at the mercy of any grand jury that a judge might see fit to summon. And he further had the right to be tried by a jury of his own race. Suppose a court had violated these rights under the constitution and laws of Hawaii, and, summoning a grand jury of bystanders, had secured the indictment of a citizen and put him on trial before a common-law petit jury, summoned as the court saw fit. Would such an indictment and such a trial have stood the test of a review by the higher court? To permit such procedure would be to indorse the exercise by a Hawaiian judge of a power never created or sanctioned by constitution or law and capable of

infinite abuse. *It was far better to proceed under the law they had than to act without any law at all.*

XIV.

If Congress had intended, when consenting to annex Hawaii, to incorporate those islands immediately into the United States and extend our Constitution and laws there, it would have made some provision to that end. If Congress had then intended to extend to the islands our grand jury and petit jury system, it would have said so. The omission indicates the lack of intention, which is confirmed by the provisions of the organic act "To provide a government for the Territory of Hawaii." In this measure Congress provided that the islands shall be known as the "Territory of Hawaii" (sec. 2); established a territorial government (sec. 3); made all persons who were citizens of the Republic of Hawaii of August 12, 1898 (the date of the transfer of sovereignty), citizens of the United States (sec. 4); and provided:

> SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

These provisions did without doubt incorporate this Territory into the United States and extend the Constitution, and laws not locally inapplicable, to it.

The organization of the islands, their incorporation as a Territory, and the extension to them of the Constitution and laws of the United States, necessarily

brought them, for the first time, within the operation of the fifth and sixth amendments and therefore required the enactment of section 83 (see Appendix) amending the law of civil and criminal procedure so as to extend our grand and petit jury system there.

In this connection let me call the attention of the court to section 10 of the organic act, which provides that—

> All offenses which by statute then [that is, during the transition period] in force were punishable *as offenses against the Republic of Hawaii* shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this act, or shall be repealed or changed by law. * * * All criminal and penal proceedings then [that is, during the transition period] *pending in the courts of the Republic of Hawaii* shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii.

The provisions of the organic act make it obvious that Congress understood that during the transition period the Constitution and laws of the United States were not in force in Hawaii; that the Constitution and laws of the Republic of Hawaii were in force there; that criminal prosecutions were conducted by the Republic of Hawaii under its laws; and that the fifth and sixth amendments had not then been extended to the islands.

JOHN K. RICHARDS,
Solicitor-General.

MARCH 7, 1903.

APPENDIX.

TREATY OF ANNEXATION OF HAWAII, NEGOTIATED IN 1897, UNDER PRESIDENT McKINLEY, SECRETARY OF STATE SHERMAN.

The United States and the Republic of Hawaii, in view of the natural dependence of the Hawaii Islands upon the United States, of their geographical proximity thereto, of the preponderant share acquired by the United States and its citizens in the industries and trade of said islands, and of the expressed desire of the Government of the Republic of Hawaii that those islands should be incorporated into the United States as an integral part thereof and under its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare.

To this end the high contracting parties have conferred full powers and authority upon their respectively appointed plenipotentiaries, to wit:

The President of the United States, John Sherman, Secretary of State of the United States.

The President of the Republic of Hawaii, Francis March Hatch, Lorrin A. Thurston, and William A. Kinney.

ARTICLE I.

The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all territory of and appertaining to the

Republic of Hawaii is hereby annexed to the United States of America under the name of the Territory of Hawaii.

ARTICLE II.

The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenues from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes.

ARTICLE III.

Until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist or as may be hereafter concluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this treaty nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

ARTICLE IV.

The public debt of the Republic of Hawaii, lawfully existing at the date of the exchange of the ratifications of the treaty, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States, but the liability of the United States in this regard shall in no case exceed $4,000,000. So long, however, as the existing government and the present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided, said government shall continue to pay the interest on said debt.

ARTICLE V.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now, or may hereafter be allowed by the laws

of the United States, and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

ARTICLE VI.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonable and practicable, recommend to Congress such legislation for the Territory of Hawaii as they shall deem necessary or proper.

ARTICLE VII.

This treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part; and by the President of the Republic of Hawaii, by and with the advice and consent of the Senate, in accordance with the constitution of said Republic, on the other; and the ratifications hereof shall be exchanged at Washington as soon as possible.

In witness whereof the respective plenipotentiaries have signed the above articles and have hereunto affixed their seals.

Done in duplicate at the city of Washington, this sixteenth day of June, one thousand eight hundred and ninety-seven.

JOHN SHERMAN. [SEAL.]
FRANCIS MARCH HATCH. [SEAL.]
LORRIN A. THURSTON. [SEAL.]
WILLIAM A. KINNEY. [SEAL.]

(Senate Doc. No. 681, Fifty-fifth Congress, second session.)

JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES (30 STAT., 750).

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed *as a part of the territory of the United States and are subject to the sovereign dominion thereof*, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of

the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, *shall be used solely for the benefit of the inhabitants of the Hawaiian Islands* for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner *as the President of the United States shall direct;* and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of the Hawaiian Islands,* not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, *shall remain in force until the Congress of the United States shall otherwise determine.*

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands *the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.*

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by

the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. *So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.*

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and *no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.*

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, *recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.*

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved July 7, 1898.

AN ACT TO PROVIDE A GOVERNMENT FOR THE TERRITORY OF HAWAII

(31 Stat., 141.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER I.—GENERAL PROVISIONS.

DEFINITIONS.

SEC. 1. That the phrase "the laws of Hawaii," as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America.

The constitution and statute laws of the Republic of Hawaii then in force, set forth in a compilation made by Sidney M. Ballou under the authority of the legislature, and published in two volumes entitled "Civil Laws" and "Penal Laws," respectively, and in the Session Laws of the Legislature for the session of eighteen hundred and ninety-eight, are referred to in this Act as "Civil Laws," "Penal Laws," and "Session Laws."

TERRITORY OF HAWAII.

SEC. 2. That the islands acquired by the United States of America under an act of Congress entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States," approved July seventh, eighteen hundred and ninety-eight, *shall be known as the Territory of Hawaii.*

GOVERNMENT OF THE TERRITORY OF HAWAII

SEC. 3. That *a Territorial government is hereby established* over the said Territory, with its capital at Honolulu, on the island of Oahu.

CITIZENSHIP.

SEC. 4. *That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.*

And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight, and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.

APPLICATION OF THE LAWS OF THE UNITED STATES.

SEC. 5. *That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: Provided,* That sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the Territory of Hawaii.

LAWS OF HAWAII.

SEC. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.

SEC. 7. That the constitution of the Republic of

Hawaii and the laws of Hawaii, as set forth in the following acts, chapters, and sections of the civil laws, penal laws, and session laws, and relating to the following subjects, are hereby repealed:

CIVIL LAWS: Sections two and three, Promulgation of laws; chapter five, Flag and seal; sections thirty to thirty-three, inclusive, Tenders for supplies; chapter seven, Minister of foreign affairs; chapter eight, Diplomatic and consular agents; sections one hundred and thirty-four and one hundred and thirty-five, National museum; chapter twelve, Education of Hawaiian youths abroad; sections one hundred and fifty to one hundred and fifty-six, inclusive, Aid to board of education; chapter fourteen, Minister of the interior; sections one hundred and sixty-six to one hundred and sixty-eight, inclusive, one hundred and seventy-four and one hundred and seventy-five, Government lands; section one hundred and ninety, Board of commissioners of public lands; section four hundred and twenty-four, Bureau of agriculture and forestry; chapter thirty-one, Agriculture and manufactures; chapter thirty-two, Ramie; chapter thirty-three, Taro flour; chapter thirty-four, Development of resources; chapter thirty-five, Agriculture; section four hundred and seventy-seven, Brands; chapter thirty-seven, Patents; chapter thirty-eight, Copyrights; sections five hundred and fifty-six and five hundred and fifty-seven, Railroad subsidy; chapter forty-seven, Pacific cable; chapter forty-eight, Hospitals; chapter fifty-one, Coins and currency; chapter fifty-four, Consolidation of public debt; chapter fifty-six, Post-office; chapter fifty-seven, Exemptions from postage; chapter fifty-eight, Postal savings banks; chapter sixty-five, Import duties; chapter sixty-six, Imports; chapter sixty-seven, Ports

of entry and collection districts; chapter sixty-eight, Collectors; chapter sixty-nine Registry of vessels; section one thousand and eleven, Custom-house charges; section eleven hundred and two, Elections; section eleven hundred and thirty-two, Appointment of magistrate; last clause of first subdivision and fifth subdivision of section eleven hundred and forty-four, first subdivision of section eleven hundred and forty-five, Jurisdiction; sections eleven hundred and seventy-three to eleven hundred and seventy-eight, inclusive, Translation of decisions; section eleven hundred and eighty-eight, Clerks of court; sections thirteen hundred and twenty-nine, thirteen hundred and thirty-one, thirteen hundred and thirty-two, thirteen hundred and forty-seven to thirteen hundred and fifty-four, inclusive, Juries; sections fifteen hundred and nine to fifteen hundred and fourteen, inclusive, Maritime matters; chapter one hundred and two, Naturalization; section sixteen hundred and seventy-eight, Habeas corpus; chapter one hundred and eight, Arrest of debtors; subdivisions six, seven, ten, twelve to fourteen of section seventeen hundred and thirty-six, Garnishment; sections seventeen hundred and fifty-five to seventeen hundred and fifty-eight, inclusive, Liens on vessels; chapter one hundred and sixteen, Bankruptcy; and sections eighteen hundred and twenty-eight to eighteen hundred and thirty-two, inclusive, Water rights.

PENAL LAWS: Chapter six, Treason; section sixty-five to sixty-seven, inclusive, Foot binding; chapter seventeen, Violation of postal laws; section three hundred and fourteen, Blasphemy; sections three hundred and seventy-one to three hundred and seventy-two, inclusive, Vagrants; sections four hundred and eleven to four hundred and thirteen, inclusive, Manufacture of liquors; chapter forty-three, Offenses on the

high seas and other waters; sections five hundred and ninety-five and six hundred and two to six hundred and five, inclusive, Jurisdiction; section six hundred and twenty-three, Procedure; section seven hundred and seven hundred and one, Imports; section seven hundred and fifteen, Auction license; section seven hundred and forty-five, Commercial travelers; sections seven hundred and forty-eight to seven hundred and fifty-five, inclusive, Firearms; sections seven hundred and ninety-six to eight hundred and nine, inclusive, Coasting trade; sections eight hundred and eleven and eight hundred and twelve, Peddling foreign goods; sections eight hundred and thirteen to eight hundred and fifteen, inclusive, Importation of live stock; section eight hundred and nineteen, Imports; sections eight hundred and eighty-six to nine hundred and six, inclusive, Quarantine; section eleven hundred and thirty-seven, Consuls and consular agents; chapter sixty-seven, whale ships; sections eleven hundred and forty-five to eleven hundred and seventy-nine, inclusive, and twelve hundred and four to twelve hundred and nine, inclusive, arrival, entry, and departure of vessels; chapters sixty-nine to seventy-six, inclusive, navigation and other matters within the exclusive jurisdiction of the United States; sections thirteen hundred and forty-seven and thirteen hundred and forty-eight, fraudulent exportation; chapter seventy-eight, Masters and servants; chapter ninety-three, Immigration; sections sixteen hundred and one, sixteen hundred and eight, and sixteen hundred and twelve, Agriculture and forestry; chapter ninety-six, Seditious offenses; and chapter ninety-nine, Sailing regulations.

SESSION LAWS: Act fifteen, Elections; act twenty-six, Duties; act twenty-seven, Exemptions from duties; act

thirty-two, Registry of vessels; section four of act thirty-eight, Importation of live stock; act forty-eight, Pacific cable; act sixty-five, Consolidation of public debt; act sixty-six, Ports of entry; and act sixty-eight, Chinese immigration.

CERTAIN OFFICES ABOLISHED.

SEC. 8. That the offices of President, minister of foreign affairs, minister of the interior, minister of finance, minister of public instruction, auditor-general, deputy auditor-general, surveyor-general, marshal, and deputy marshal of the Republic of Hawaii are hereby abolished.

AMENDMENT OF OFFICIAL TITLES.

SEC. 9. That wherever the words "President of the Republic of Hawaii," or "Republic of Hawaii," or "Government of the Republic of Hawaii," or their equivalents, occur in the laws of Hawaii not repealed by this act, they are hereby amended to read "Governor of the Territory of Hawaii," or "Territory of Hawaii," or "Government of the Territory of Hawaii," or their equivalents, as the context requires.

CONSTRUCTION OF EXISTING STATUTES.

SEC. 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed; and those in favor of or against the Republic of Hawaii, and not assumed by or transferred to the United States, shall be equally valid in favor of or against the government of the Territory of Hawaii. *All offenses which by statute then in force were punishable as offenses against the*

Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this act, or shall be repealed or changed by law. No person shall be subject to imprisonment for nonpayment of taxes nor for debt. *All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii;* all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii: *Provided*, That no suit or proceedings shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or service, nor shall any remedy exist or be enforced for breach of any such contract, except in a civil suit or proceeding instituted solely to recover damages for such breach: *Provided further*, That the provisions of this section shall not modify or change the laws of the United States applicable to merchant seamen.

That all contracts made since August twelfth, eighteen hundred and ninety-eight, by which persons are held for service for a definite term, are hereby declared null and void and terminated, and no law shall be passed to enforce said contracts in any way; and it shall be the duty of the United States marshal to at once notify such persons so held of the termination of their contracts.

That the act approved February twenty-sixth, eighteen hundred and eighty-five, "To prohibit the

importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," and the acts amendatory thereof and supplemental thereto, be, and the same are hereby, extended to and made applicable to the Territory of Hawaii.

STYLE OF PROCESS.

SEC. 11. That the style of all process in the Territorial courts *shall hereafter run in the name of "The Territory of Hawaii,"* and all prosecutions shall be carried on in the name and by the authority of the Territory of Hawaii.

CHAPTER II.—THE LEGISLATURE.

THE LEGISLATIVE POWER.

SEC. 12. That the legislature of the Territory of Hawaii shall consist of two houses, styled, respectively, the senate and house of representatives, which shall organize and sit separately, except as otherwise herein provided.

The two houses shall be styled "The legislature of the Territory of Hawaii."

SEC. 13. That no person shall sit as a senator or representative in the legislature unless elected under and in conformity with this act.

GENERAL ELECTIONS.

SEC. 14. That a general election shall be held on the Tuesday next after the first Monday in November, nineteen hundred, and every second year thereafter: *Provided, however*, That the governor may, in his discretion, on thirty days' notice, order a special election before the first general election, if, in his opinion, the public interests shall require a special session of the legislature.

EACH HOUSE JUDGE OF QUALIFICATIONS OF MEMBERS.

SEC. 15. That each house shall be the judge of the elections, returns, and qualifications of its own members.

DISQUALIFICATIONS OF LEGISLATORS.

SEC. 16. That no member of the legislature shall, during the term for which he is elected, be appointed or elected to any office of the Territory of Hawaii.

DISQUALIFICATIONS OF GOVERNMENT OFFICERS AND EMPLOYEES.

SEC. 17. That no person holding office in or under or by authority of the Government of the United States or of the Territory of Hawaii shall be eligible to election to the legislature, or to hold the position of a member of the same while holding said office.

SEC. 18. No idiot or insane person, and no person who shall be expelled from the legislature for giving or receiving bribes or being accessory thereto, and no person who, in due course of law, shall have been convicted of any criminal offense punishable by imprisonment, whether with or without hard labor, for a term exceeding one year, whether with or without fine, shall register to vote or shall vote or hold any office in, or under, or by authority of, the government, unless the person so convicted shall have been pardoned and restored to his civil rights.

OATH OF OFFICE.

SEC. 19. That every member of the legislature, and all officers of the government of the Territory of Hawaii shall take the following oath or affirmation:

I solemnly swear (or affirm), in the presence of

Almighty God, that I will faithfully support the Constitution and laws of the United States, and conscientiously and impartially discharge my duties as a member of the legislature, or as an officer of the government of the Territory of Hawaii (as the case may be).

OFFICERS AND RULES.

SEC. 20. That the senate and house of representatives shall each choose its own officers, determine the rules of its own proceedings, not inconsistent with this act, and keep a journal.

AYES AND NOES.

SEC. 21. That the ayes and noes of the members on any question shall, at the desire of one-fifth of the members present, be entered on the journal.

QUORUM.

SEC. 22. That a majority of the number of members to which each house is entitled shall constitute a quorum of such house for the conduct of ordinary business, of which quorum a majority vote shall suffice; but the final passage of a law in each house shall require the vote of a majority of all the members to which such house is entitled.

SEC. 23. That a smaller number than a quorum may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may provide.

SEC. 24. That, for the purpose of ascertaining whether there is a quorum present, the chairman shall count the number of members present.

PUNISHMENT OF PERSONS NOT MEMBERS.

SEC. 25. That each house may punish by fine, or by imprisonment not exceeding thirty days, any person not a member of either house who shall be guilty of disrespect of such house by any disorderly or contemptuous behavior in its presence or that of any committee thereof; or who shall, on account of the exercise of any legislative function, threaten harm to the body or estate of any of the members of such house; or who shall assault, arrest, or detain any witness or other person ordered to attend such house, on his way going to or returning therefrom; or who shall rescue any person arrested by order of such house.

But the person charged with the offense shall be informed, in writing, of the charge made against him, and have an opportunity to present evidence and be heard in his own defense.

COMPENSATION OF MEMBERS.

SEC. 26. That the members of the legislature shall receive for their services, in addition to mileage at the rate of ten cents a mile each way, the sum of four hundred dollars for each regular session of the legislature, payable in three equal installments on and after the first, thirtieth, and fiftieth days of the session, and the sum of two hundred dollars for each extra session of the legislature.

PUNISHMENT OF MEMBERS.

SEC. 27. That each house may punish its own members for disorderly behavior or neglect of duty, by censure, or by a two thirds vote suspend or expel a member.

EXEMPTION FROM LIABILITY.

SEC. 28. That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions in either house.

EXEMPTION FROM ARREST.

SEC. 29. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of over ten days each way.

THE SENATE.

NUMBER OF MEMBERS.

SEC. 30. That the Senate shall be composed of fifteen members, who shall hold office for four years: *Provided, however*, That of the senators elected at the first general election, two from the first district, one from the second, three from the third, and one from the fourth district shall hold office for two years only, the details of such apportionment to be provided for by the legislature.

VACANCIES.

SEC. 31. That vacancies caused by death, resignation, or otherwise shall be filled for the unexpired term at general or special elections.

SENATORIAL DISTRICTS.

SEC. 32. That for the purpose of representation in the senate, until otherwise provided by law, the Terri-

tory is divided into the following senatorial districts, namely:

First district: The island of Hawaii.

Second district: The islands of Maui, Molokai, Lanai, and Kahoolawe.

Third district: The island of Oahu.

Fourth district: The islands of Kauai and Niihau.

SEC. 33. That the electors in the said districts shall be entitled to elect senators as follows:

In the first district, four;

In the second district, three;

In the third district, six;

In the fourth district, two.

QUALIFICATIONS OF SENATORS.

SEC. 34. That in order to be eligible to election as a senator a person shall—

Be a male citizen of the United States;

Have attained the age of thirty years;

Have resided in the Hawaiian Islands not less than three years and be qualified to vote for senators in the district from which he is elected.

THE HOUSE OF REPRESENTATIVES.

NUMBER OF REPRESENTATIVES.

SEC. 35. That the house of representatives shall be composed of thirty members, elected, except as herein provided, every second year.

TERM OF OFFICE.

SEC. 36. That the term of office of the representatives elected at any general or special election shall be until the next general election held thereafter.

VACANCIES.

SEC. 37. That vacancies in the office of representative caused by death, resignation, or otherwise shall be filled for the unexpired term at special elections.

REPRESENTATIVE DISTRICTS.

SEC. 38. That for the purpose of representation in the house of representatives, until otherwise provided by law, the Territory is divided into the following representative districts, namely:

First district. That portion of the island of Hawaii known as Puna, Hilo, and Hamakua.

Second district. That portion of the island of Hawaii known as Kau, Kona, and Kohala.

Third district. The islands of Maui, Molokai, Lanai, and Kahoolawe.

Fourth district. That portion of the island of Oahu lying east and south of Nuuanu street and a line drawn in extension thereof from the Nuuanu Pali to Mokapu Point.

Fifth district. That portion of the island of Oahu lying west and north of the fourth district.

Sixth district. The islands of Kauai and Niihau.

APPORTIONMENT.

SEC. 39. That the electors in the said districts shall be entitled to elect representatives as follows:

In the first district, four.

In the second district, four.

In the third district, six.

In the fourth district, six.

In the fifth district, six.

In the sixth district, four.

QUALIFICATIONS OF REPRESENTATIVES.

SEC. 40. That in order to be eligible to be a member of the house of representatives a person shall, at the time of election—

Have attained the age of twenty-five years;

Be a male citizen of the United States;

Have resided in the Hawaiian Islands not less than three years;

And shall be qualified to vote for representatives in the district from which he is elected.

LEGISLATION.

SESSIONS OF THE LEGISLATURE.

SEC. 41. That the first regular session of the legislature shall be held on the third Wednesday in February, nineteen hundred and one, and biennially thereafter, in Honolulu.

SEC. 42. That neither house shall adjourn during any session for more than three days, or sine die, without the consent of the other.

SEC. 43. That each session of the legislature shall continue not longer than sixty days, excluding Sundays and holidays: *Provided, however*, That the governor may extend such session for not more than thirty days.

The governor may convene the legislature, or the senate alone, in special session, and, in case the seat of government shall be unsafe, from an enemy, riot, or insurrection, or any dangerous disease, direct that any regular or special session shall be held at some other than the regular meeting place.

ENACTING CLAUSE—ENGLISH LANGUAGE.

SEC. 44. That the enacting clause of all laws shall be, "Be it enacted by the legislature of the Territory of Hawaii."

All legislative proceedings shall be conducted in the English language.

TITLE OF LAWS.

SEC. 45. That each law shall embrace but one subject, which shall be expressed in its title.

READING OF BILLS.

SEC. 46. That a bill in order to become a law shall, except as herein provided, pass three readings in each house, on separate days, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes and entered upon its journal.

CERTIFICATION OF BILLS FROM ONE HOUSE TO THE OTHER.

SEC. 47. That every bill when passed by the house in which it originated, or in which amendments thereto shall have originated, shall immediately be certified by the presiding officer and clerk and sent to the other house for consideration.

SIGNING BILLS.

SEC. 48. That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor.

VETO OF GOVERNOR.

SEC. 49. That every bill which shall have passed the legislature shall be certified by the presiding officers

and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it, and it shall become a law. If the governor does not approve such bill, he may return it, with his objections, to the legislature.

He may veto any specific item or items in any bill which appropriates money for specific purposes; but shall veto other bills, if at all, only as a whole.

PROCEDURE UPON RECEIPT OF VETO.

SEC. 50. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes, which shall be entered upon its journal.

If after such reconsideration such bill, or part of a bill, shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become law.

FAILURE TO SIGN OR VETO.

SEC. 51. That if the governor neither signs nor vetoes a bill within ten days after it is delivered to him it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such ten days.

If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature by their adjournment prevents its return, in which case it shall not be a law.

APPROPRIATIONS.

SEC. 52. That appropriations, except as otherwise herein provided, shall be made biennially by the legislature: *Provided, however*, That pending the time when this act shall take effect and until a session of the legislature of the Territory of Hawaii shall be held, the President may, in his discretion, authorize and direct the use of such money in the treasury of the Republic of Hawaii, as well as of the Territory of Hawaii, as he shall think requisite and proper for carrying on the government of the Territory of Hawaii, the preservation of the public health, the completion of the sewerage system of the city of Honolulu, and such other expenditures as in the President's judgment shall seem to be appropriate.

SEC. 53. That the governor shall submit to the legislature, at each regular session, estimates for appropriations for the succeeding biennial period.

SEC. 54. That in case of failure of the legislature to pass appropriation bills providing for payments of the necessary current expenses of carrying on the government and meeting its legal obligations as the same are provided for by the then existing laws, the governor shall, upon the adjournment of the legislature, call it in extra session for the consideration of appropriation bills, and until the legislature shall have acted the treasurer may, with the advice of the governor, make such payments, for which purpose the sums appropriated in the last appropriation bills shall be deemed to have been reappropriated. And all legislative and other appropriations made prior to the date when this act shall take effect shall be available to the government of the Territory of Hawaii.

LEGISLATIVE POWER.

SEC. 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. The legislature, at its first regular session after the census enumeration shall be ascertained, and from time to time thereafter, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory; but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; nor shall it grant private charters, but it may by general act permit persons to associate themselves together as bodies corporate for manufacturing, agricultural, and other industrial pursuits, and for conducting the business of insurance, savings banks, banks of discount and deposit (but not of issue), loan, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association: *Provided*, That no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres; and all real estate acquired or held by such corporation or association contrary thereto shall be forfeited and escheat to the United States, but existing vested rights in real estate shall not be impaired. No divorce shall be granted by the legislature, nor shall any divorce be

granted by the courts of the Territory unless the applicant therefor shall have resided in the Territory for two years next preceding the application, but this provision shall not affect any action pending when this act takes effect; nor shall any lottery or sale of lottery tickets be allowed; nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the Territorial legislature shall provide; nor shall any public money be appropriated for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government; nor shall the government of the Territory of Hawaii, or any political or municipal corporation or subdivision of the Territory, make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, and harbor and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any subdivision shall not exceed one per centum upon the assessed value of taxable property of the Territory or subdivision thereof, as the case may be, as shown by the last general assessment for taxation, and the total indebtedness for the Territory shall not at any time be extended beyond

seven per centum of such assessed value, and the total indebtedness of any subdivision shall not at any time be extended beyond three per centum of such assessed value, but nothing in this provision shall prevent the refunding of any existing indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof, nor shall any bond or other instrument of any such indebtedness be issued unless made redeemable in not more than five years and payable in not more than fifteen years from the date of the issue thereof; nor shall any such bond or indebtedness be incurred until approved by the President of the United States.

TOWN, CITY, AND COUNTY GOVERNMENT.

SEC. 56. That the legislature may create counties and town and city municipalities within the Territory of Hawaii and provide for the government thereof.

ELECTIONS.

EXEMPTION OF ELECTORS ON ELECTION DAY.

SEC. 57. That every elector shall be privileged from arrest on election day during his attendance at election and in going to and returning therefrom, except in case of breach of the peace then committed, or in case of treason or felony.

SEC. 58. That no elector shall be so obliged to perform military duty on the day of election as to prevent his voting, except in time of war or public danger, or in case of absence from his place of residence in actual military service, in which case provision may be made by law for taking his vote.

METHOD OF VOTING FOR REPRESENTATIVES.

SEC. 59. That each voter for representative may cast a vote for as many representatives as are to be elected from the representative district in which he is entitled to vote.

The required number of candidates receiving the highest number of votes in the respective representative districts shall be the representatives for such districts.

QUALIFICATIONS OF VOTERS FOR REPRESENTATIVES.

SEC. 60. That in order to be qualified to vote for representatives a person shall—

First. Be a male citizen of the United States.

Second. Have resided in the Territory not less than one year preceding and in the representative district in which he offers to register not less than three months immediately preceding the time at which he offers to register.

Third. Have attained the age of twenty-one years.

Fourth. Prior to each regular election, during the time prescribed by law for registration, have caused his name to be entered on the register of voters for representatives for his district.

Fifth. Be able to speak, read, and write the English or Hawaiian language.

METHOD OF VOTING FOR SENATORS.

SEC. 61. That each voter for senator may cast one vote for each senator to be elected from the senatorial district in which he is entitled to vote.

The required number of candidates receiving the highest number of votes in the respective senatorial districts shall be the senators for such district.

QUALIFICATIONS OF VOTERS FOR SENATORS AND IN ALL OTHER ELECTIONS.

SEC. 62. That in order to be qualified to vote for senators and for voting in all other elections in the Territory of Hawaii a person must possess all the qualifications and be subject to all the conditions required by this act of voters for representatives.

SEC. 63. That no person shall be allowed to vote who is in the Territory by reason of being in the Army or Navy or by reason of being attached to troops in the service of the United States.

SEC. 64. That the rules and regulations for administering oaths and holding elections set forth in Ballou's Compilation, Civil Laws, Appendix, and the list of registering districts and precincts appended, are continued in force with the following changes, to wit:

Strike out the preliminary proclamation and sections one to twenty-six, inclusive, sections thirty and thirty-nine, the second and third paragraphs of section forty-eight, the second paragraph of section fifty, and sections sixty-two, sixty-three, and sixty-six, second paragraph of section one hundred.

In section twenty-nine strike out all after the word "Niihau" and in lieu thereof insert: "The boards of registration existing at the date of the approval of this act shall go out of office, and new boards, which shall consist of three members each, shall be appointed by the governor, by and with the advice and consent of the senate, whose terms of office shall be four years. Appointments made by the governor when the senate is not in session shall be valid until the succeeding meeting of that body."

In section thirty-one strike out "the first day of April and the thirtieth day of June, in the year

eighteen hundred and ninety-seven," and insert in lieu thereof "the last day of August and the tenth day of October, in the year nineteen hundred."

Strike out the words "and the detailed record" in sections fifty-two and one hundred and twelve.

Strike out "marshal" wherever it occurs and insert in lieu thereof "high sheriff."

Strike out of section fifty-three the words "except as provided in section one hundred and fourteen hereof."

In sections fifty-three, fifty-four, fifty-six, fifty-seven, fifty-nine, sixty, seventy-one, seventy-five, eighty-six, ninety-two, ninety-three, ninety-four, ninety-five, one hundred and eleven, one hundred and twelve, and one hundred and thirteen strike out the words "minister" and "minister of the interior" wherever they occur and insert in lieu thereof the words "secretary of the Territory."

In section fifty-six, paragraph three, strike out "interior office" and insert "office of the secretary of the Territory."

In section fifty-six, first paragraph, after the words "candidate for election" insert "to the legislature;" and in the last paragraph strike out the word "only."

Strike out the word "elective" in section sixty-four.

In sections twenty-seven, sixty-four, sixty-five, sixty-eight, seventy, and seventy-two strike out the words "minister of the interior" or "minister" wherever they occur and insert in lieu thereof the word "governor."

Amend section sixty-seven so that it will read: "At least forty days before any election the governor shall issue an election proclamation and transmit copies of the same to the several boards of inspectors throughout the Territory, or where such election is to be held."

In section seventy-five strike out the word "perfectly," and in section seventy-six strike out "in" and insert "on."

In section one hundred and twelve strike out "Interior Department" and insert in lieu thereof "office of the secretary of the Territory."

In section one hundred and fourteen strike out the word "Republic" wherever it occurs and insert in lieu thereof "Territory."

In section one hundred and fifteen strike out the words "minister" and "minister of the interior" and insert in lieu thereof "treasurer," and strike out all after the word "refreshments:" *Provided, however*, That for the holding of a special election before the first general election the governor may prescribe the time during which the boards of registration shall meet and the registration be made.

SEC. 65. That the legislature of the Territory may from time to time establish and alter the boundaries of election districts and voting precincts and apportion the senators and representatives to be elected from such districts.

CHAPTER 3.—THE EXECUTIVE.

THE EXECUTIVE POWER.

SEC. 66. That the executive power of the government of the Territory of Hawaii shall be vested in a governor, who shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and shall hold office for four years and until his successor shall be appointed and qualified, unless sooner removed by the President. He shall be not less than thirty-five years of age; shall be a citizen of the Territory of Hawaii; shall be com-

mander in chief of the militia thereof; may grant pardons or reprieves for offenses against the laws of the said Territory and reprieves for offenses against the laws of the United States until the decision of the President is made known thereon.

ENFORCEMENT OF LAW.

SEC. 67. That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.

GENERAL POWERS OF THE GOVERNOR.

SEC. 68. That all the powers and duties which, by the laws of Hawaii, are conferred upon or required of the President or any minister of the Republic of Hawaii (acting alone or in connection with any other officer or person or body) or the cabinet or executive council, and not inconsistent with the Constitution or laws of the United States, are conferred upon and required of the governor of the Territory of Hawaii, unless otherwise provided.

SECRETARY OF THE TERRITORY.

SEC. 69. That there shall be a secretary of the said Territory, who shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and who shall be a citizen of the Territory of Hawaii and hold his office for four years and until his successor shall be appointed and qualified, unless sooner removed by the President. He shall record and preserve all the laws and proceedings of the legislature and all acts and proceedings of the governor, and promulgate proclamations of the governor. He shall, within thirty days after the end of each session of the legislature, transmit to the President, the President of the Senate, and the Speaker of the House of Representatives of the United States one copy each of the laws and journals of such session. He shall transmit to the President, semi-annually, on the first days of January and July, a copy of the executive proceedings, and shall perform such other duties as are prescribed in this act or as may be required of him by the legislature of Hawaii.

ACTING GOVERNOR IN CERTAIN CONTINGENCIES.

SEC. 70. That in case of the death, removal, resignation, or disability of the governor, or his absence from the Territory, the secretary shall exercise all the powers and perform all the duties of governor during such vacancy, disability, or absence, or until another governor is appointed and qualified.

ATTORNEY-GENERAL.

SEC. 71. That there shall be an attorney-general, who shall have the powers and duties of the attorney-general and those of the powers and duties of the min-

ister of the interior which relate to prisons, prisoners, and prison inspectors, notaries public, and escheat of lands under the laws of Hawaii, except as changed by this act and subject to modification by the legislature.

TREASURER.

SEC. 72. That there shall be a treasurer, who shall have the powers and duties of the minister of finance and those of the powers and duties of the minister of the interior which relate to licenses, corporations, companies, and partnerships, business conducted by married women, newspapers, registry of conveyances, and registration of prints, labels, and trade-marks under the laws of Hawaii, except as changed in this act and subject to modification by the legislature.

COMMISSIONER OF PUBLIC LANDS.

SEC. 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii between the seventh day of July, eighteen hundred and ninety-eight, and twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. In said laws "land patent" shall be substituted for "royal patent;" "commissioner of public lands" for "minister of the interior," "agent of public lands," and "commissioners of public lands," or their equivalents; and the words "that I am a citizen of the United States," or

"that I have declared my intention to become a citizen of the United States, as required by law," for the words "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," or "that I have received letters of denization under the Republic of Hawaii," or "that I have received a certificate of special right of citizenship from the Republic of Hawaii." And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct. All funds arising from the sale or lease or other disposal of such lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: *Provided*, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive order, or orders, by the President of the United States

COMMISSIONER OF AGRICULTURE AND FORESTRY.

SEC. 74. That the laws of Hawaii relating to agriculture and forestry, except as changed by this act, shall continue in force, subject to modification by Congress or the legislature. In said laws "commissioner of agriculture and forestry" shall be substituted, respectively, for "bureau," "bureau of agriculture and forestry," "commissioner," "commissioners of agriculture," and "commissioners for the island of Oahu."

SUPERINTENDENT OF PUBLIC WORKS.

SEC. 75. That there shall be a superintendent of public works, who shall have the powers and duties of

the superintendent of public works and those of the powers and duties of the minister of the interior which relate to streets and highways, harbor improvements, wharves, landings, waterworks, railways, electric light and power, telephone lines, fences, pounds, brands, weights and measures, fires and fireproof buildings, explosives, eminent domain, public works, markets, buildings, parks and cemeteries, and other grounds and lands now under the control and management of the minister of the interior, and those of the powers and duties of the minister of finance and collector-general which relate to pilots and harbor masters under the laws of Hawaii, except as changed by this act and subject to modification by the legislature. In said laws the word "legislature" shall be substituted for "councils" and the words "the circuit court" for "the Hawaiian Postal Savings Bank."

SUPERINTENDENT OF PUBLIC INSTRUCTION.

SEC. 76. That there shall be a superintendent of public instruction, who shall have the powers and perform the duties conferred upon and required of the minister of public instruction by the laws of Hawaii as amended by this act, and subject to modification by the legislature.

It shall be the duty of the United States Commissioner of Labor to collect, assort, arrange, and present in annual reports statistical details relating to all departments of labor in the Territory of Hawaii, especially in relation to the commercial, industrial, social, educational, and sanitary condition of the laboring classes, and to all such other subjects as Congress may by law direct. The said commissioner is especially charged to ascertain, at as early a date as possible, and as often thereafter as such information may be required,

the highest, lowest, and average number of employees engaged in the various industries in the Territory, to be classified as to nativity, sex, hours of labor, and conditions of employment, and to report the same to Congress.

AUDITOR AND DEPUTY AUDITOR.

SEC. 77. That there shall be an auditor and deputy auditor, who shall have the powers and duties conferred upon and required of the auditor-general and deputy auditor-general, respectively, by act thirty-nine of the session laws, as amended by this act, subject to modification by the legislature. In said act "officer" shall be substituted for "minister" where used without other designation.

SURVEYOR.

SEC. 78. That there shall be a surveyor, who shall have the powers and duties heretofore attached to the surveyor-general, except such as relate to the geodetic survey of the Hawaiian Islands.

HIGH SHERIFF.

SEC. 79. That there shall be a high sheriff and deputies, who shall have the powers and duties of the marshal and deputies of the Republic of Hawaii under the laws of Hawaii, except as changed by this act, and subject to modification by the legislature.

APPOINTMENT, REMOVAL, TENURE, AND SALARIES OF OFFICERS.

SEC. 80. That the President shall nominate and, by and with the advice and consent of the Senate, appoint the chief justice and justices of the supreme court, the judges of the circuit courts, who shall hold

their respective offices for the term of four years, unless sooner removed by the President; and the governor shall nominate and, by and with the advice and consent of the senate of the Territory of Hawaii, appoint the attorney-general, treasurer, commissioner of public lands, commissioner of agriculture and forestry, superintendent of public works, superintendent of public instruction, auditor, deputy auditor, surveyor, high sheriff, members of the board of health, commissioners of public instruction, board of prison inspectors, board of registration and inspectors of election, and any other boards of a public character that may be created by law; and he may make such appointments when the senate is not in session by granting commissions, which shall, unless such appointments are confirmed, expire at the end of the next session of the senate. He may, by and with the advice and consent of the senate of the Territory of Hawaii, remove from office any of such officers. All such officers shall hold office for four years and until their successors are appointed and qualified, unless sooner removed, except the commissioners of public instruction and the members of said boards, whose terms of office shall be as provided by the laws of the Territory of Hawaii.

The manner of appointment and removal and the tenure of all other officers shall be as provided by law; and the governor may appoint or remove any officer whose appointment or removal is not otherwise provided for.

The salaries of all officers other than those appointed by the President shall be as provided by the legislature, but those of the chief justice and the justices of the supreme court and judges of the circuit courts shall not be diminished during their term of office.

All officers appointed under the provisions of this section shall be citizens of the Territory of Hawaii.

All persons holding office in the Hawaiian Islands at the time this act takes effect shall continue to hold their respective offices until their successors are appointed and qualified, but not beyond the end of the first session of the senate of the Territory of Hawaii unless reappointed as herein provided.

CHAPTER IV.

THE JUDICIARY.

SEC. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. *And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided.*

SUPREME COURT.

SEC. 82. That the supreme court shall consist of a chief justice and two associate justices, who shall be citizens of the Territory of Hawaii and shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, and may be removed by the President: *Provided, however,* That in case of the disqualification or absence of any justice thereof, in any cause pending before the court, on the trial and determination of said cause his place shall be filled as provided by law.

LAWS CONTINUED IN FORCE.

SEC. 83. *That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, sub-*

ject to modification by Congress or the legislature. The *provisions of said laws* or any laws of the Republic of Hawaii which *require juries to be composed of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only,* in civil and criminal cases specified in said laws *are repealed,* and all juries shall hereafter be constituted *without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States* and twenty-one years of age and *who can not understandingly speak, read, and write the English language* shall be a qualified juror or grand juror in the Territory of Hawaii. *No person shall be convicted in any criminal case except by unanimous verdict of the jury.* No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries, and shall sit at such times as the circuit judges of the respective circuits shall direct; the number of grand jurors in each circuit shall be not less than thirteen, and the method of the presentation of cases to said grand jurors shall be prescribed by the supreme court of the Territory of Hawaii. The several circuit courts may subpœna witnesses to appear before the grand jury in like manner as they subpœna witnesses to appear before their respective courts.

DISQUALIFICATION BY RELATIONSHIP, PECUNIARY INTEREST, OR PREVIOUS JUDGMENT.

SEC. 84. That no person shall sit as judge or juror, in any case in which his relative by affinity or by consanguinity within the third degree is interested, either

as a plaintiff or defendant, or in the issue of which the said judge or juror may have, either directly or through such relative, any pecuniary interest. No judge shall sit on an appeal, or new trial, in any case, in which he may have given a previous judgment.

CHAPTER 5.—UNITED STATES OFFICERS.

DELEGATE TO CONGRESS.

SEC. 85. That a Delegate to the House of Representatives of the United States, to serve during each Congress, shall be elected by the voters qualified to vote for members of the house of representatives of the legislature; such Delegate shall possess the qualifications necessary for membership of the senate of the legislature of Hawaii. The times, places, and manner of holding elections shall be as fixed by law. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting.

FEDERAL COURT.

SEC. 86. That there shall be established in said Territory a district court to consist of one judge, who shall reside therein and be called the district judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said district, and said judge, attorney, and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction

of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States. Writs of error and appeals from said district court shall be had and allowed to the circuit court of appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held at Honolulu on the second Monday in April and October and at Hilo on the last Wednesday in January of each year; and special terms may be held at such times and places in said district as the said judge may deem expedient. The said district judge shall appoint a clerk for said court at a salary of three thousand dollars per annum, and shall appoint a reporter of said court at a salary of twelve hundred dollars per annum.

INTERNAL-REVENUE DISTRICT.

SEC. 87. *That the Territory of Hawaii shall constitute a district for the collection of the internal revenue of the*

United States, with a collector, whose office shall be at Honolulu, and deputy collectors at such other places in the several islands as the Secretary of the Treasury shall direct.

CUSTOMS DISTRICT.

SEC. 88. *That the Territory of Hawaii shall comprise a customs district of the United States, with ports of entry and delivery at Honolulu, Hilo, Mahukona, and Kahului.*

CHAPTER 6.—MISCELLANEOUS.

REVENUES FROM WHARVES.

SEC. 89. That until further provision is made by Congress the wharves and landings constructed or controlled by the Republic of Hawaii on any seacoast, bay, roadstead, or harbor shall remain under the control of the government of the Territory of Hawaii, which shall receive and enjoy all revenues derived therefrom, on condition that said property shall be kept in good condition for the use and convenience of commerce, but no tolls or charges shall be made by the government of the Territory of Hawaii for the use of any such property by the United States, or by any vessel of war, tug, revenue cutter, or other boat or transport in the service of the United States.

SEC. 90. That Hawaiian postage stamps, postal cards, and stamped envelopes at the post-offices of the Hawaiian Islands when this act takes effect shall not be sold, but, together with those that shall thereafter be received at such offices as herein provided, shall be canceled under the direction of the Postmaster-General of the United States; those previously sold and uncanceled shall, if presented at such offices within six months after this act takes effect, be received at their face value in exchange for postage stamps, postal cards,

and stamped envelopes of the United States of the same aggregate face value and, so far as may be, of such denominations as desired.

SEC. 91. That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii.

SEC. 92. That the following officers shall receive the following annual salaries, to be paid by the United States: The governor, five thousand dollars; the secretary of the Territory, three thousand dollars; the chief justice of the supreme court of the Territory, five thousand five hundred dollars, and the associate justices of the supreme court, five thousand dollars each, and the judges of the circuit courts, three thousand dollars each. The salaries of the said chief justice and the associate justices of the supreme court, and the judges of the circuit courts as above provided, shall be paid by the United States; the United States district judge, five thousand dollars; the United States marshal, two thousand five hundred dollars; the United States district attorney, three thousand dollars. And the governor shall receive annually, in addition to his salary, the sum of five

hundred dollars for stationery, postage, and incidentals; also his traveling expenses while absent from the capital on official business, and the sum of two thousand dollars annually for his private secretary.

IMPORTS FROM HAWAII INTO THE UNITED STATES.

SEC. 93. *That imports from any of the Hawaiian Islands, into any State or any other Territory of the United States, of any dutiable articles not the growth, production, or manufacture of said islands, and imported into them from any foreign country after July seventh, eighteen hundred and ninety-eight, and before this act takes effect, shall pay the same duties that are imposed on the same articles when imported into the United States from any foreign country.*

INVESTIGATION OF FISHERIES.

SEC. 94. That the Commissioner of Fish and Fisheries of the United States is empowered and required to examine into the entire subject of fisheries and the laws relating to the fishing rights in the Territory of Hawaii, and report to the President touching the same, and to recommend such changes in said laws as he shall see fit.

REPEAL OF LAWS CONFERRING EXCLUSIVE FISHING RIGHTS.

SEC. 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested right shall be valid after three years from the taking effect of this act, unless established as hereinafter provided.

PROCEEDINGS FOR OPENING FISHERIES TO CITIZENS.

SEC. 96. That any person who claims a private right to any such fishery shall, within two years after the taking effect of this act, file his petition in a circuit court of the Territory of Hawaii, setting forth his claim to such fishing right, service of which petition shall be made upon the attorney-general, who shall conduct the case for the Territory, and such case shall be conducted as an ordinary action at law.

That if such fishing right be established, the attorney-general of the Territory of Hawaii may proceed, in such manner as may be provided by law for the condemnation of property for public use, to condemn such private right of fishing to the use of the citizens of the United States upon making just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the Territory of Hawaii not otherwise appropriated.

QUARANTINE.

SEC. 97. That quarantine stations shall be established at such places in the Territory of Hawaii as the Supervising Surgeon-General of the Marine-Hospital Service of the United States shall direct, and the quarantine regulations for said islands relating to the importation of diseases from other countries shall be under the control of the Government of the United States. The quarantine station and grounds at the harbor of Honolulu, together with all the public property belonging to that service, shall be transferred to the Marine-Hospital Service of the United States, and said quarantine grounds shall continue to be so used and employed until the station is changed to other grounds which may be selected by order of the Secretary of the Treasury.

The health laws of the government of Hawaii relating to the harbor of Honolulu and other harbors and inlets from the sea and to the internal control of the health of the islands shall remain in the jurisdiction of the government of the Territory of Hawaii, subject to the quarantine laws and regulations of the United States.

SEC. 98. That all vessels carrying Hawaiian registers on the twelfth day of August, eighteen hundred and ninety-eight, and which were owned bona fide by citizens of the United States, or the citizens of Hawaii, together with the following-named vessels claiming Hawaiian register, Star of France, Euterpe, Star of Russia, Falls of Clyde, and Wilscott, shall be entitled to be registered as American vessels, with the benefits and privileges appertaining thereto, and the coasting trade between the islands aforesaid and any other portion of the United States, shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts.

SEC. 99. That the portion of the public domain heretofore known as Crown land is hereby declared to have been, on the twelfth day of August, eighteen hundred and ninety-eight, and prior thereto, the property of the Hawaiian Government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.

SEC. 100. That for the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former

allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.

SEC. 101. That Chinese in the Hawaiian Islands when this act takes effect may within one year thereafter obtain certificates of residence as required by "An act to prohibit the coming of Chinese persons into the United States," approved May fifth, eighteen hundred and ninety-two, as amended by an act approved November third, eighteen hundred and ninety-three, entitled "An act to amend an act entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May fifth, eighteen hundred and ninety-two," and until the expiration of said year shall not be deemed to be unlawfully in the United States if found therein without such certificates: *Provided, however, That no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Territory, or District of the United States from the Hawaiian Islands*

SEC. 102. That the laws of Hawaii relating to the establishment and conduct of any postal savings bank or institution are hereby abolished. And the Secretary of the Treasury, in the execution of the agreement of the United States as expressed in an act entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States," approved July seventh, eighteen hundred and ninety-eight, shall pay the amounts on deposit in the Hawaiian Postal Savings Bank to the persons entitled thereto, according to their respective rights, and he shall make all needful orders, rules, and regulations for paying such persons and for notifying such persons to present their demands for

payment. So much money as is necessary to pay said demands is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be available on and after the first day of July, nineteen hundred, when such payments shall begin, and none of said demands shall bear interest after said date, and no deposit shall be made in said bank after said date. Said demands of such persons shall be certified to by the chief executive of Hawaii as being genuine and due to the persons presenting the same, and his certificate shall be sealed with the official seal of the Territory, and countersigned by its secretary, and shall be approved by the Secretary of the Interior, who shall draw his warrant for the amount due upon the Treasurer of the United States, and when the same are so paid no further liabilities shall exist in respect of the same against the governments of the United States or of Hawaii.

SEC. 103. That any money of the Hawaiian Postal Savings Bank that shall remain unpaid to the persons entitled thereto on the first day of July, nineteen hundred and one, and any assets of said bank shall be turned over by the government of Hawaii to the Treasurer of the United States, and the Secretary of the Treasury shall cause an account to be stated, as of said date, between such government of Hawaii and the United States in respect to said Hawaiian Postal Savings Bank.

SEC. 104. *This act shall take effect forty-five days from and after the date of the approval thereof*, excepting only as to section fifty-two, relating to appropriations, which shall take effect upon such approval.

Approved, April 30, 1900.

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MAR 17 1902

In the Supreme Court

October Term, 1901.

UNITED STATES.

In the Matter of the Application of Osaki Mankichi for a Writ of Habeas Corpus.

Appeal of the Territory of Hawaii from the District Court of the United States in and for said Territory.

BRIEF FOR APPELLEE

GEORGE A. DAVIS AND P. M. BROOKS

Counsellors at Law.

HONOLULU:
Hawaiian Gazette Co., Ltd.
1902.

IN THE

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION
OF OSAKI MANKICHI
FOR A WRIT OF HABEAS CORPUS.

APPEAL OF THE TERRITORY OF HAWAII FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID TERRITORY.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

The appellant, Osaki Mankichi, was indicted for the crime of Murder in the First Degree, and a True Bill was found upon this indictment on the 4th day of May, A. D. 1899.

The following appears upon the indictment, "A true Bill found this 4th day of May, A. D., 1899", signed, "A. Perry, First Judge of the First Circuit Court, presiding at the term."

By virtue of this Indictment, the prisoner was put upon his trial at the May term of the Circuit Court, A. D., 1899, before the Hon. A. Perry, First Circuit Judge, and by a Jury was found guilty of Manslaughter in the First Degree and was by the Hon. A. Perry sentenced to be imprisoned at hard labor for a term of twenty years.

The verdict of Guilty was rendered by nine (9) only of the Jurors; three of the jurors who sat upon the trial of this cause dissented from the verdict. The same Judge who found the

True Bill under the Indictment presided at the trial and sentenced the prisoner.

II.

Argument.

The first assignment of error, *i. e.* that the Court erred in granting a Writ of Habeas Corpus. It is submitted and contended that the United States District Court rightfully assumed jurisdiction in this case because it clearly appears that the Circuit Court had no jurisdiction to try, convict, and sentence this prisoner upon an Indictment which was not found by a Grand Jury duly and regularly summoned in accordance with Art. V of the Constitution of the United States.

The Hawaiian Islands on the 7th day of July, A. D., 1897, by a Joint Resolution of Congress and the Senate, was annexed to the United States and became a part of the Union and subject to the sovereign dominion thereof. By the terms of this Joint Resolution the Municipal Laws of the Hawaiian Islands, not inconsistent with the Joint Resolution *nor contrary to the Constitution of the United States,* are continued in force until Congress shall otherwise determine.

On the 14th day of August, A. D., 1898, the formal transfer of the Sovereignty of the Republic of Hawaii, and its acceptance by the United States took place. The American Minister to the Republic of Hawaii at the time of the formal transfer said to the President of the Republic of Hawaii, "Mr. President, in the name of the United States, I accept the transfer of the Sovereignty and the transfer of the Property of the Hawaiian Government." The Hawaiian flag was then lowered and the Stars and Stripes raised by direction of the Minister.

The Republic of Hawaii ceased to exist on the 14th day of August, A. D., 1898, and the Hawaiian Islands became United States territory.

This prisoner was tried in United States territory without the indictment of a Grand Jury by a Circuit Judge, who was continued in office under the Newlands Resolution. The President of the United States had the power to remove the Judge who tried this prisoner, and yet it is contended that the Constitution did not apply. The words of the Resolution are, "Municipal legislation not contrary to the Constitution of the United States shall remain in force until Congress shall otherwise determine." See *United*

States vs. *Arredondo*, 6 Peters 691-748; 9 Wall 32; *Davis* vs. *Concordia*, 9th Howard 280.

United States District Court was bound to grant the application of this prisoner for a Writ of Habeas Corpus. The Writ of Habeas Corpus extends to the prisoner who is in custody in violation to the Constitution of the United States. *Ex parte Dore*, 3 Howard 103; *Ex parte Barnes*, 1 Sprague 133; *Ex parte Bridges*, 2 Woods 428.

The actual delivery of this Country took place on the 4th day of August, A. D., 1898, and the Sovereignty formally passed on that day from the Republic of Hawaii to the United States. The national government of the Union, by the voice of the people, had added these islands and made them a part of the body politic and corporate, and the United States Government was then invested with supreme authority here for national purposes, with power to exercise all such authority that was expressly or impliedly committed to its jurisdiction by the Constitution. See Potter's Dwarris on Stat. & Constitutions, Sec. 333. *Congress which is only the creature of the Constitution*, cannot make any such change in such fundamental law. See P. D. on Stat. and Con. 355.

The Constitution of the United States is an original, written, federal and social compact, freely and voluntarily entered into by the several States and ratified by the people, and the Federal Government is bound by that Constitution to every citizen of the United States. P. D. Stat. and Con. 355.

Trials, therefore, at least such as are criminal, are to be regular and conducted in their essential features, not by statute but by the Common Law. This is the constitutional guaranty. *P. D. Stat. and Con.* 437.

Art. V of the Constitution of the United States provides that no prisoner can be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. Grand Juries alone can find probable cause to put a prisoner on trial under an Indictment by finding a True Bill. See *Ex parte Bain* 121 U. S. 1 1-2; *Hill* vs. *People*, 16 Mich. 351; *United States* vs. *Taylor*, 11 Fed. Rep. 421; *Cancemi* vs. *People*, 18 N. Y. 129; *Ex parte Wilson*, 114 United States 417.

This Court held in the case of ex parte Bain that according to principles long settled a prisoner who stands sentenced to the Penitentiary upon an Indictment that has been changed by a prosecuting officer without the consent of the Court is entitled

to his discharge upon a Writ of Habeas Corpus. The statute of the Republic of Hawaii was not only contrary to and inconsistent with this provision of the United States Constitution, but a direct violation to the Constitution and an infringement upon the liberty of the citizen.

It is contended that the conviction was absolutely null and void. There was nothing before the Court on which it could hear evidence or pronounce sentence. This case comes within the principles laid down by this Court. See *Ex parte Lange*, 85 U. S. 18, Wallace 163 1-2; *Ex parte Parks*, 93 U. S. 18, and *Ex Parte Wilson*.

Ex parte Bain expressly overrules the case of Hurtado vs. the People of California, 110 U. S. 516.

The statement in the brief of the Attorney General of the Territory that the Grand Jury was foreign to Hawaiian Law under the Republic of Hawaii and the Monarchy which preceded it and that Section 616 of the Penal Laws of 1897, which is a direct violation of the United States Constitution, can have but little weight. The Constitution must govern.

On the 5th day of July, A. D., 1900, the Supreme Court of the Territory of Hawaii prescribed certain rules relating to Grand Juries:

Rule 1st prescribes: When Required.
" 2: How drawn.
" 3: Qualification of Jurors.
" 4: Number of Jurors.
" 5: Sessions.
" 6: Challenges.
" 7: Foreman.
" 8: Oath to Grand Jurors.
" 9: Charge of the Court.
" 10: Affairs in Attendance.
" 11: Retirement of the Grand Jury.
" 12: Clerk.
" 13: Subpoena of Witnesses.
" 14: Swearing Witnesses.
" 15: Presence of Others with Jurors.
" 16: Twelve Grand Jurors to Concur.
" 17: Endowment by Former and Prosecuting Officer.
" 18: Presenting and Filing.

Had these rules been prescribed by the Circuit Judge at the time of the formal transfer of the Sovereignty of this Country, the Grand Jury system would not have been foreign to Hawaiian

Law. These rules contain all there is in Hawaiian jurisprudence upon the Grand Jury system.

III.

The United States District Court did not err in assuming jurisdiction of the prisoner's application for a Writ of Habeas Corpus because it clearly appears by the petition filed in that Court that the Circuit Court of the Hawaiian Islands, under this Indictment, had no jurisdiction to try this prisoner for the crime of murder.

This Honorable Supreme Court in the case of re Frederick, 149 U. S. 70, held that the Writ of Habeas Corpus is the proper remedy where the verdict or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the Court having exceeded its jurisdiction.

Mr. Justice Harlan in *ex parte Royal*, 117 U. S. 241, held where a person is in custody under process from a State Court of original jurisdiction for an alleged offence against the laws of such State and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him upon Habeas Corpus in advance of his trial in the Court in which he is indicted, that discretion, however, to be subordinated to any special circumstances required in immediate action. When the State Court shall have finally acted upon the case, the Circuit Court still has a discretion whether under all circumstances then existing, the accused, if convicted, shall be put to his Writ of Error to the higher Court of the State or whether it will proceed by Writ of Habeas Corpus summarily to determine whether the petitioner is restrained of his liberty in violation to the Constitution of the United States.

The only ground on which this Court, or any other Court, without some statute authorizing it, will give relief on Habeas Corpus to a prisoner under conviction and sentence to another Court is the want of jurisdiction in such Court, rendering its proceedings void. These proceedings are absolutely void and the neglect to prescribe the rules and the calling of a Grand Jury is sought to be avoided by contending that the Constitution of the United States was not in force in the Hawaiian Islands until after the passage of the Act to Provide a Government for the Territory of Hawaii. The following authorities are relied on in support of the jurisdiction: *Neagles, case of*, 135 U. S. 1; *Ex parte Condt.*, 112 U. S. 178; *Ex parte Royal*, 117 U. S. 241, 245; *Ex parte Fonda*, 117 U. S. 516; *Ex parte Lange*, 85 U. S.

Where the conviction and sentence are void, the Court will discharge the prisoner upon a Writ of Habeas Corpus.

IV.

The third Assignment of Error; that the Court erred in holding that the defendant should have been indicted by a Grand Jury. It is submitted that this contention is not supported by reason or authority. This Honorable Supreme Court in the case of *Delima et al.*, Plaintiffs in Error, vs. *George Bidwell*, decided May 27th, 1901, says, "We are unable to acquiesce in this assumption that a Territory may be, at the same time, both foreign and domestic." By the Second Art. of the Treaty of Peace between the United States and Spain, signed December 10th, 1898, and ratified April 11th, 1899, Spain ceded to the United States the Island of Porto Rico, which has ever since been in our possession and has been governed and administered by us. If the case depended solely upon these facts and the question presented, whether a country which had been ceded to U. S., the cession accepted, possession delivered, and the Islands occupied and administered by the United States, without interference by Spain or any other power, was a foreign or domestic territory; it would seem that there would be as little hesitation in answering this question as there would be in ascertaining the ownership of a house deeded in fee simple to a purchaser under law, who has signed the deed, taken possession, paid taxes, and made improvements without let or hindrance from his vendor. This is just exactly what was done in the case of Hawaii. The islands were ceded, the cession was accepted, and it became United States territory. It was not only the intention of Congress to admit Hawaii into a Constitutional union with the United States, but they have actually done so. The Constitutional provision securing life, liberty and property must have been in force and extended to Hawaii on the cession of the territory and the acceptance of the United States. The very words of the Resolution, "Municipal legislation of the Hawaiian Islands, not contrary to the Constitution of the United States, shall remain in force until the Congress of the United States shall otherwise determine", establishes beyond a question that only such laws as were not contrary to the Constitution would be enforced in these Islands, and Congress in Organic Act specially provided for a unanimous verdict. They do not provide in the Organic Act that no person shall be held for a capital, or infamous crime, unless on the Indictment of a Grand Jury, but they do provide that Grand Juries can be drawn in the manner

provided by the Hawaiian statute for Grand Juries. The fixed number of Grand Jurors—thirteen (13). If it was not intended that the constitutional provision with reference to the indictment by Grand Juries should not apply until the Organic Act was signed, or until it was specified in the Organic Act, why is the Organic Act silent on this point?

The Bible and the Altar are, and were, as much adhered to and respected at the time of the passage of the Newlands Resolution in Hawaii as in the State of California; the methods of taxation in this country were the same; the affairs of the Government, it was claimed by those in power, was carried on on the same lines as the State Governments in the United States; our system of jurisprudence copied that of the Union; Anglo-Saxon principles prevailed; we were American in theory and in practice, and every embassador, plenipotentiary and delegate sent from Hawaii urged upon Congress and the Senate of the United States that this was a civilized country, with a system of laws, with Courts, with Religion, with Intelligence, with Wealth, and that the time was ripe for annexation; and so Congress accepted us and accepted and relied upon the statements that the Hawaiian Ministers and Commissioners made at Washington as true, and the Constitution came here with the flag, and it was well known that the Constitution would be in force when the cession of these Islands was completed; and the indictment of the defendant by a Grand Jury was, and is, a constitutional right which the statute of an extinct Oligarchy cannot override or take away.

V.

The fourth, fifth and sixth Assignment of Errors, it is submitted cannot be sustained. The Hawaiian Islands were not acquired by conquest; there was no military occupation of them. The United States acquired them by a Joint Resolution of Congress and the Senate; took formal possession of them and held them without the interference of any foreign power; and the United States held them subject to the constitution and laws of the United States and not according to the laws of the Hawaiian Islands. "Any nation acquiring territory by treaty, or otherwise, must hold it subject to the Constitution and Laws of its own Government, and not according to the Laws of the Government ceding it." 1 *Wharton's Digest Int. Law*, p. 4; *Pollard Lessee* vs. *Hagen*, 3 Howard 212.

The rights and powers of sovereignty of a nation over its territory ceases on the transfer of that sovereignty to another Gov-

ernment by cession of its territory. The power to preserve peace and order may remain in the officers previously appointed by the ceding state until the actual presence of the agents of the succeeding government, but this does not apply that soverign power remains in the former nation. *United States* vs. *Reynes*, 9 How. 127; *Davis* vs. *Concordia*, 9 How. 280; *Montalt* vs. *U. S.*, 12 Howard 47; *U. S.* vs. *D'Autrieve*, 10 How. 609.

Immediately after the acceptance by the American Minister of the sovereignty and property of the Hawaiian Government every officer holding office under the Hawaiian Government immediately took an oath to support the Constitution and Laws of the United States and the Chief Justice of the Supreme Court of the Hawaiian Islands administered the oath on that day to a large number of the officials. Circuit Judge Perry, who presided at the trial and convicted and sentenced this prisoner, took the oath to support the Constitution and Laws of the United States on that day.

Every action of the Supreme Court of the Hawaiian Islands relative to the United States which impairs the supremacy of the national authority and the rights of persons under the Constitution of the United States, is void. *Texas* vs. *Wight*, 7 Wall 700; *Horn* vs. *Lockhart*, 17 Wall 570; *Sprout* vs. *United States*, 20 Wall 459.

We are dealing with territory of the United States, and not a sovereign State, and it is contended that the authority submitted by the Honorable Attorney General of the Territory of Hawaii on page 9 of his brief does not apply. It requires the unanimous verdict of twelve (12) Jurors to lawfully convict the prisoner of the crime of Manslaughter. This Honorable Supreme Court in the case of *Thompson* vs. *State of Utah* held that the State of Utah did not acquire, on its admission into the Union, the power to provide in respective felonies committed within its limits while it was a Territory; that they should be tried otherwise than by such a Jury as is provided by the Federal Constitution.

The verdict of nine (9) Jurors is in direct violation and contrary to the Constitution of the United States, and a violation of the Common Law of England. Such procedure is a menace and source of danger to her institution. The New York Court of Appeals in the case of *Cancemi* vs. *The People*, 18 N. Y. 37, decided that when one Juror was withdrawn by consent of the defendant that the conviction was absolutely void. Said the Court, "The State and public have an interest in the preservance of the liberty and lives of the citizens, and will not allow them to be taken away without due process of law."

Consent by the criminal cannot give jurisdiction. The right of a speedy and public trial by an impartial jury is guaranteed to every one accused of crime, by the Amendment to Art. VI of the Constitution of the United States and it is a right which cannot be waived. See case of *U. S.* vs. *Taylor*, 11 Fed. Rep. 470; *State* vs. *Maine*, 27 Conn. 281; *U. S.* vs. *Haskell*. 4 Wash. C. C. 402; *Wm. Hill* vs. *People*, 16 Mich. 351; *Thompson* vs. *State of Utah*, 170 U. S., decides that the provision in the national Constitution relating to trials by jury and to criminal prosecutions, applies to the territories of the United States.

The Hawaiian Islands at the time of the finding of the True Bill upon this Indictment was territory of the United States. The United States acquired this territory by Resolution of Congress and the Senate and accepted it and they held it subject to the Constitution of the United States Government and not according to the Laws of the Hawaiian Islands which in this respect are contrary to and in direct conflict with the United States Constitution. 1 *Wharton's Digest Int. Law*, p. 4; *Pollard's Leasee* vs *Hagan*, 3 How. 212.

VI.

The Newland's Resolution itself extended the Constitution to these Islands. After the cession and acceptance of the Hawaiian Islands, the Constitution of the Republic of Hawaii was certainly not in force. The people had a flag; it was the Stars and Stripes which was raised on that day. Absolute sovereignty and supremacy of the National Government existed, and surely the Constitution came also.

It is therefore submitted that the seventh assignment of error cannot be sustained. Trial upon such an indictment found by a Circuit Judge, who had taken an oath to support the Constitution of the United States amounts to nothing.

There was nothing to try and the conviction and sentence were therefore absolutely null and void.

It is submitted to this Honorable Supreme Court that it would have been an easy matter for the Attorney General and the Judge of the Court of Record, who held his office during the will and pleasure of the President of the United States to have prescribed the rules relating to Grand Juries, which the Supreme Court afterwards did and they could have protected the country from anarchy and crime effectually and completely and the rights of citizens and others upon United States territory would have been protected.

I address this Honorable Supreme Court through this brief in the spirit of our Constitution, "When a stranger places his foot upon American soil acquired in the way these Islands were, the ground he stands upon is holy and consecrated to the genius of Liberty." It makes no difference whether he is white or black, or how humble, he can only be tried and convicted and sentenced in accordance with the Constitution, and it was so held in *Ex parte Edwards,* 13 Hawaiian, which is now being prepared. We forward the decision; the Court was differently made up. Judge A. Perry did not sit.

There were extraordinary reasons for the interference of the United States District Court to grant this Writ of Habeas Corpus. Circuit Judge Gear had issued a Writ of Habeas Corpus and discharged the prisoner upon the ground that his trial, conviction and sentence were absolutely null and void and the Territory of Hawaii in the absence of a statutory provision allowing the Territory to appeal from a decision and order discharging a prisoner upon a Writ of Habeas Corpus appealed to the Supreme Court of the Territory and the Supreme Court of the Territory held that the conviction and sentence of this defendant was legal and valid. The case was fully presented to the Hawaiian Supreme Court and the Honorable Antonio Perry, who found the Bill of Indictment against this Defendant, who presided at his trial, and sentenced the prisoner, sat on the appeal in the Supreme Court, notwithstanding the protests filed by the prisoner's counsel that he was disqualified by the provisions of the Act to Provide a Government for the Territory of Hawaii. The provision of that Act is as follows:

"No Judge shall sit on an appeal, or new trial, in any case in which he may have given a previous judgment."

Circuit Judge Perry is now the Second Associate Justice of the Supreme Court of the Territory and was at the time of the hearing of this appeal, so that this Honorable Supreme Court may be fully conversant with the facts of this case, I respectfully append to this brief a copy of the brief filed in the Supreme Court on the hearing of this case on Appeal, and I respectfully submit that the Amendments to the Constitution were in force at the time of the trial and conviction of this prisoner and that ample legal machinery could have been provided for his lawful trial, conviction and sentence and that the Appeal of the Territory should be dismissed.

GEORGE A. DAVIS and F. M. BROOKS,
Counsel for the Prisoner, Osaki Mankichi.

APPENDIX.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII, AUGUST TERM, A. D. 1901.

IN THE MATTER OF THE PETITION OF OSAKI MANKICHI FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM THE ORDER OF THE SECOND JUDGE OF FIRST CIRCUIT COURT GRANTING SAID WRIT AND DISCHARGING SAID PETITIONER.

PETITIONER'S BRIEF ON APPEAL.

It is submitted that this Honorable Court is absolutely without jurisdiction to hear the appeals from the decision of the Circuit Judge in these cases. The Attorney General has relied upon Section 1145 of the Civil Laws, which provides that the Judges of the several Circuit Courts shall have power in Chambers within their respective jurisdictions, but subject to appeal to the Circuit or Supreme Courts according to law as follows:

In the 8th sub-section to issue writs of habeas corpus according to law, the appeal provided by law in the Statute, Sections 1433, 1434 and 1435, is not applicable to habeas corpus proceedings.

Section 1433 provides that a notice of appeal shall be filed within five days, accrued costs shall be paid and a bond given in the sum of Fifty Dollars.

Section 1434 provides that the Supreme Court shall have power to review, reverse, affirm, amend, modify or remand such decision, judgment, order or decree, in whole or in part; whereas in habeas corpus proceedings on appeal facts cannot be reviewed, as it is only the jurisdiction of the Court or excess of jurisdiction. This section also gives power to the appellate courts to hear newly discovered evidence. It also provides that nothing herein contained shall be construed to permit an appeal from any *order*, judge or administrator allowing any warrant, attachment, writ or other proceedings, or for any other order of a like nature.

Section 1435 provides that an appeal duly taken and perfected shall operate as an arrest of judgment and stay of execution and provides that execution may issue pending such appeal upon good and sufficient cause being shown therefor. Surely these

provisions do not apply to proceedings on appeal from a judgment or order discharging prisoners upon habeas corpus.

The general appeal is not applicable nor is there anything in the Section quoted, from which it can be inferred that they are applicable. The Supreme Court because of its Superior jurisdiction may discharge a prisoner held under criminal process, where the committment is voidable only, or where the grounds of committment are insufficient, but it must have appellate jurisdiction in the given case. It is not sufficient that it has a more extensive jurisdiction or is of higher dignity; it must have the power to reverse the judgment in the particular case; the power to correct or reverse the action of the inferior court. Where no such power exists, a court will refuse to act. The errors complained of were the grounds of committment and must be brought under review by the appellate court by means of an appropriate process and that is the writ of certiorari used in connection with the writ of habeas corpus. The record itself is never removed by the habeas corpus as it is by the certiorari; besides the certiorari goes to the Judge, but habeas corpus to the officer. Again, when certiorari issues in order to use the record as evidence, then the tenor of return is sufficient and court hears the appeal as for record, but when the record itself is to be proceeded upon, the record itself must be returned, and there is no difference when the proceeding upon the record is to be removed whether it be before judgment or after. In both cases, the record itself must be removed.

The effect of habeas corpus in removal of cause is only to suspend the proceedings of the inferior court, but the certiorari removes the cause.

The records in these cases were not properly before the Court, neither was the cause removed by notice of appeal by petitioner. See *Church upon Habeas Corpus*, 2d Edition, sec. 259.

In the cases therein cited, the right of appeal from a judgment on Habeas Corpus has been a matter of debate in the American Courts and it has been repudiated and denied by the ablest Courts and Jurists on the continent. *Macfarlane* vs. *Johnson*, 27 Texas 105; *Bill* vs. *State*, 4th Gill 301-304; *Ex parte Thompson*, 93 Ills. 89; *Hammond* vs. *The People*, 32 Ills. 446; see Sec. 389 *Church upon Habeas Corpus and note*, and the cases therein cited.

The Legislature has provided no procedure whereby an appeal can be taken from an order of a Circuit Court discharging a prisoner upon Habeas Corpus.

It is also further provided by Section 1674 of the Civil Laws that no person who has been discharged upon a Writ of Habeas

Corpus shall be again imprisoned or restrained for the same cause unless he shall be indicted therefor and convicted thereof or committed for want of bail by some court of record having jurisdiction in the cause. How then in the face of this statute can the judgment of the Circuit Judge discharging the prisoner from custody be suspended by any order of this Appellate Court?

An appeal is a Civil Law process and removes a cause entirely subjecting the law and the fact to a review or retrial. *Holmes* vs. *Johnson*, 14 Peter 621; 7th *Cranch*, U. S. 110; *U. S.* vs. *Tenbrook*, 2d Wheaton U. S. Reports 248.

These defendants were all discharged and the restraint removed; they had regained their liberty. The proceedings therefore must terminate in the Appellate Court and that Court will not enquire into the legality of a detention which no longer exists; such is the uniform practice. See *Ex parte Cole*, 14 Texas Appeals 579; see Section 89 *Church on Habeas Corpus*, page 142; note thereon.

In California it has been held that no appeal lies from the order of a Judge admitting a party to bail under the provisions of the Habeas Corpus Act. *Street* vs. *Schuster*, 40 Cal. 627.

In this State there is no appellate practice in Habeas Corpus cases. See *Church upon Habeas Corpus*, Section 389.

In the absence of any statute, the decision of a Circuit Judge discharging the prisoner can only be revoked by error or writ of error.

The common law of England and America is expressly made a part of our law in the absence of statute practice of the English Courts, and the procedure must be followed in order to give this Court jurisdiction. A writ of error would be the appropriate remedy because it is a common law process and removes for re-examination nothing but the law.

A decision on Habeas Corpus is not appealable, or subject to review. The section of *re adjudicata* has no application to such a case. See *Hawes on Jurisdiction*, Section 181; *Magter of Ring*, 28 Cal. 251; 2d *Cal.* 429; 10th *Gray* 240; 72 *Maine* 202; 60 *Pacific* 591; *Ex parte Thompson*, 93 Ills. 89; *Re Curley*, 34 Iowa 185.

A discharge under a Writ of Habeas Corpus by a Court of competent jurisdiction being in favor of personal liberty, is final and conclusive, and an arrest under the same charge is unlawful. *Ex parte Jiltz*, 64 Mo. 208.

The appellant has neither removed the cause nor the record into this Honorable Superior Court by any process known to law, and how can this Court be called upon to take jurisdiction and

hear a cause which is not properly before it? And especially in and over the Hawaiian Islands were ceded and transferred when the right of appeal is forbidden being granted to the respondent and the law has not conferred it upon him. See *The State* vs. *Everett,* and *State* vs. *Potter; Dudley So. Carolina,* 295-296.

The especial attention of the Court is called to the case of *Commonwealth,* 21 Gilbert; *Cummings same,* 21 James; *McGuires* 3 Cushing 212.

In this State a writ of error does not lie in a criminal case in behalf of the Commonwealth.

The right to file exceptions in a criminal case is confined to the defendant.

II.

It is further submitted, assuming that the cause and the record is before that appellate court, which is in no way admitted, than, what questions can this court review on appeal. A Circuit Judge certainly has jurisdiction to issue a writ of habeas corpus and to discharge the defendants, and this appellate court will not reverse the same for error where the court below nad jurisdiction in the cause and of the prisoner, and where it would not be reversable on a writ of error.

The jurisdiction and power to hear and determine same could be enquired into either before or after judgment, or in final conviction, but where the power or jurisdiction exists, its existence will not be enquired into. This applies to the respondent as well as to the prisoner.

It is further submitted that by a resolution passed by Congress and the Senate of the United States jointly, which resolution was signed by the President of the United States on the 6th day of July, 1898, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands were ceded and transferred to the United States of America, which cession was accepted, ratified and confirmed by the Government of the Republic of Hawaii, and that after the signing of this resolution by the President of the United States, the Hawaiian Islands became annexed and a part of the territory of the United States and subject to the sovereign dominion thereof. 1st Bishop Sec. 114; *State* vs. *Carter,* 3 Dutcher 499-501; *State* vs. *Kelley,* 36 Maine 331; 49 American Report 620; 47 American Report 247; *Green* vs. *The State,* 66 Alabama 40-45; 41 American Report 744.

The crimes and offences which these defendants committed were committed in United States territory. They were charged

with capital and infamous crimes and bills of indictment were preferred and true bills were found thereon by the Judges of the Circuit Court, which it was claimed was without authority of law and jurisdiction, and in contravention of Article Five of the Amendment to the Constitution of the United States.

The resolution annexing this country provides that the municipal legislation of the Hawaiian Islands *not contrary to the Constitution of the United States,* shall remain in force until the Congress of the United States shall otherwise determine.

The finding of a true bill by the Circuit Judge or any other person or body, except a Grand Jury, properly and legally empowered to act at a term of the Court is a direct violation of Article 5 of the Amendment to the Constitution of the United States. What power or authority has a Circuit Judge to find a bill against a prisoner for a capital or infamous crime and place him upon his trial.

The case of *Ex parte Bane,* 121 U. S. page 1, overrules *Hurtardo* vs. *The People,* and expressly decides that a prisoner who was convicted and sentenced, and who was confined without the indictment of a Grand Jury, was illegally confined and is entitled to be discharged. There can be no mistaking this decision; it is far reaching.

The United States of America having acquired the Hawaiian Islands in the manner heretofore set forth could only hold them subject to the Constitution and laws of the United States, and the finding of a bill of indictment by a Judge of the Circuit Court renders the proceedings against these defendants absolutely void.

Any act on the part of the Courts of these Islands which impairs the sovereignty of the national authority and the rights of defendants under the Constitution of the United States is void. *Texas* vs. *White,* 7 Wall 700; *Horne* vs. *Lockhardt,* 17 Wall 570; *Sprout* vs. *United States,* 20 Wall 459.

Some of these defendants were convicted by less than twelve jurors. These convictions and sentences were absolutely void. See the case of *Thompson* vs. *The State of Utah,* 170th U. S. page 344.

The Supreme Court of the United States decided in this case that the jury referred to in the Federal Constitution, and in the Sixth Amendment thereto, was a jury composed as it was in common law, of twelve persons, neither more nor less, and that the State of Utah did not acquire upon its admission into the Union, the power to provide in respect to felonies committed within its limts, while it was a Territory, that they should be tried

otherwise, than by such a jury, and as provided by the Federal Constitution.

They also decided that it is not in the power of a person accused of felony, by consent expressly given, or by silence to authorize a jury of only eight persons to pass upon his guilt instead of a complete jury of twelve persons.

Says the Supreme Court of the United States:

"If one under trial for a felony, the punishment of which is confinement in the penitentiary, could not legally consent that the trial proceed in his absence, still less could he consent to be deprived of his liberty by a tribunal not authorized to detain him by law to ascertain his guilt."

In our opinion the provision of the Constitution of Utah providing for trial in Courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons is *ex post facto,* and it is applicable to felonies committed before the Territory became a State, because in respect to such crime, the Constitution of the United States gives the accused at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and makes it impossible to deprive him of his liberty except on the unanimous verdict of such jury.

The Supreme Court of the United States in the case of *Delima et al., plaintiffs in error,* vs. *George R. Bidwell,* decided on May 27th, 1901, says:

"We are unable to acquiesce in this assumption that a Territory may be at the same time both foreign and domestic."

That also decided that Porto Rico was not a foreign country, even within the meaning of the tariff laws, and their language is hereby cited, to-wit:

"We are therefore of the opinion that at the time these duties were revised, Porto Rico was not a foreign country within the meaning of the tariff laws, but a Territory of the United States; that the duties were illegally exacted and that the plaintiffs are entitled to recover them back."

It must be remembered that Porto Rico was acquired through war. The Supreme Court of the United States in its opinion in this case expressly states that the Island had been for some months under military rule of the United States as a conquered country.

When by the Second Article of the Treaty of Peace between the United States and Spain, signed December 10th, 1898, and ratified April 11th, 1899, Spain ceded to the United States the Island of Porto Rico, which has ever since been in our possession

and has been governed and administered by us. If the case depended solely upon these facts, and the question presented whether a country which had been ceded to us, the cession accepted, possession delivered, and the Island occupied and administered by the United States without interference by Spain, or any other power, was a foreign country or domestic territory, it would seem that there could be no little hesitation in answering this question, as there *would be in ascertaining the ownership of a house deeded in fee simple to a purchaser under law, who has accepted the deed, taken possession and paid taxes and made improvements without let or hindrance from his vendor.* This is just exactly what was done in the case of Hawaii. The Islands were ceded, the cession was accepted and it became the United States Territory. Whereas the Island of Porto Rico was acquired by treaty after conquest. It was not only the intention of Congress to admit Hawaii into a constitutional union with the United States, but they have actually done so.

The constitutional provisions securing life, liberty and property must have been in force and extended to Hawaii on the cession of the Territory, and the acceptance of the United States. The very words of the resolution—"Municipal legislation of the Hawaiian Islands not contrary to the Constitution of the United States, shall remain in force until the Congress of the United States shall otherwise determine"—establish beyond question that only such laws as were not contrary to the Constitution would be enforced in these Islands, and Congress in the Organic Act specially provides for a unanimous verdict. They did not provide under the Organic Act that no person shall be held for capital or infamous crime unless on indictment of a Grand Jury, but they did provide that Grand Juries can be drawn in the manner provided, for Hawaiians, by the Hawaiian statute for drawing jurors. The fixed number of Grand Jurors is thirteen. If it was not intended that the constitutional provisions with reference to the indictment of Grand Juries should not apply until the Organic Act was signed, or until it was specified in the Organic Act, why is the Act silent on this point?

On page 26 of the Attorney General's brief, he uses this language:

"If those possessions are inhabited by alien races differing from us in religion, custom, laws, methods of trade and modes of thought, the means of government and justice, according to the Anglo-Saxon principles, may for a time be impossible, and the question at once arises whether large concession ought not to be

made for the time that ultimately our own theories may be carried out and the blessings of a free government under the Constitution extend to them." "We decline to hold there is anything in the Constitution to forbid such action."

This reasoning does not apply to Hawaii, for there are no heathen in these Islands at the present time. The Bible and the altar are and were as much adhered to and respected at the time of the passage of the resolution, in Hawaii, as in the State of California. Our laws and customs were the same. The methods of taxation were the same. The administration of Government was carried on and it was the boast of those in power that they followed the Government of the United States closely. Our system of jurisprudence copied that of the Union. Anglo-Saxon principles prevailed. We were American in theory and in practice and every ambassador, plenipotentiary and delegate, sent from Hawaii, urged upon Congress and the Executive that this was a civilized country with a system of laws, with courts, with religion, with intelligence, with wealth, and that the time was ripe for annexation, and so Congress accepted us, and accepted, believed and relied upon the statements that our ministers and commissioners made at Washington, as true, and the Constitution came here with the Flag, and Congress well knew that the Constitution would be in force when they accepted these Islands.

We submit that the statement on pages 28 and 29 of the Attorney General's brief, that a State can dispense with indictments by Grand Juries, that it can dispense with unanimous verdicts, that it can dispense altogether with trial by jury, and that the provisions of the Constitution in regard to these matters are held by the Supreme Court of the United States not to apply, is a most remarkable statement, and will not bear investigation. In the cases just cited, that of *Thompson* vs. *The State of Utah*, the Supreme Court of the United States held that the State of Utah did not acquire on its admission into the Union the power to provide in respect to felonies committed within the limits while it was a Territory. That prisoners accused of crime should be tried otherwise than by such a jury as provided by the Federal Constitution, and also decided that the provision of the Constitution of Utah providing for the trial courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons is *expost facto* in its application to felonies committed before the Territory became a State.

If Hawaii was admitted into the Union and followed the suggestion of the Attorney General by the provision in its Constitu-

tion that no indictment was necessary; that a less number than twelve jurors could try and convict a person accused of crime which was committed in this Territory, he would find that such a provision would be of no avail and that the Supreme Court of the United States would follow the very able decision of Mr. Justice Harlan, delivered in the case of *Thompson* vs. *The State of Utah,* and which is law in the United States and its several Territories. Says Mr. Justice Harlan:

"It was not for the State in respect of a crime committed within its limits while it was a Territory to dispense with that guarantee simply because it people had reached the conclusion that the truth could be as well determined, and the liberty of an accusee be as well guarded by eight as by twelve jurors in a criminal case. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty except on the countenance of a court and a jury of twelve persons. The wise men who framed the Constitution of the United States, and the people who relied upon it, were of the opinion that life, liberty and property, when involved in criminal prosecution cannot be adequately detained except through the unanimous verdict of twelve jurors."

These Islands became Territory of the United States and Congress by the Organic Act, created a Territory, not a State, and all the provisions of the Federal Constitution with reference to life, liberty and property, the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecution, apply to the Territories of the United States. We are dealing with Territories—this is a Territory, and the reasoning of the Attorney General's brief and the startling statements made as to indictments and prosecutions are silenced by the decision in *Thompson* vs. *The State of Utah,* which is to the Court of last resort of the Republic of which we are now a part and were a part at the time these defendants were tried, convicted and sentenced.

Says the Supreme Court of the United States in *Ex parte Bain*: "In the syllabus according to principles long settled in this Court, the prisoner who stands sentenced to the penitentiary on such a trial (referring to a trial without an indictment by the Grand Jury) is entitled to his discharge by writ of habeas corpus."

This means that he will be discharged from custody and that he cannot be held, imprisoned or detained in a convict prison of a Territory of the United States, or any place within its jurisdiction, without having been tried upon an indictment preferred and

found by a Grand Jury, and found guilty by a unanimous verdict of twelve jurors. See *Ex parte Lange*, 85 U. S. 18; 18th Wall 163; *Ex parte Lange*, 85 U. S. 18; *Ex parte Parker*, 93 U. S. 18; *Ex parte Wilson*.

The Supreme Court of the former Territory of Hawaii has as a rule given great weight to the decisions of the Supreme Court of the State of Massachusetts.

In the case of *Jones* vs. *Robbin*, 8 Gray 329, wherein Justice Shaw says: "That the Grand Jury is as valuable as ever in securing individual assistance from an open and public accusation of crime from the trouble, expense and anxiety of a public trial before a probable cause is established by the preferment and indictment of a Grand Jury. And in the case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty, recognized again and again by the highest tribunals of the Nation.

Says Justice Harlan citing from the case of *Callan* vs. *Wilson*, 127 U. S. 540:

"The recognition was demanded and secured for the benefit of all the people of the United States as well as those permanently or temporarily residing in the District of Columbia, or those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of any of the benefits of the constitutional guarantee of life, liberty and property, *especially of the privilege of trial by jury in criminal cases.* We cannot think ," the Court further says. "that the people in this District have in that regard less rigtns than those accorded to the people of the Territory of the United States."

The Attorney General of the United States has expressly stated that Hawaii became the Territory of the United States upon the signing of the joint resolution known as the "Newlands" resolution, by the President.

The decision of the Judge who discharged these prisoners and the opinion and decision filed by him is hereby referred to, and this Honorable Supreme Court is respectfully requested to consider it as a part of this brief.

The attention of this Honorable Supreme Court is again respectfully called to, and it is submitted that there is no legislation or established practice for the guidance of parties invoking

the jurisdiction of the Supreme Court in habeas corpus proceedings.

In the note to Section 69: "Prior to 1867 there were no regulations or established practice for the guidance of parties invoking jurisdiction of the Supreme Court and it was necessary to issue a Writ of Certiorari in addition to the Writ of Habeas Corpus. See *Ex parte McCardle*, 6th Wall, 318, 324.

Says Chief Justice Chase in delivering the opinion of the Court:

"But although the exercise of appellate jurisdiction over judgment of inferior tribunals was not uniform to the practice of this Court before the Act of 1867, it was attended by some inconvenience and embarrassment. It is necessary to use the *Writ of Certiorari* in addition to the Writ of Habeas Corpus, and there is no regulation or established practice for the guidance of parties invoking jurisdicton."

In the case of *Ex parte Dougan*, 2d Wall 134: This Court by Habeas Corpus aided by Writ of Certiorari reviewed and revised the judgment of the Circuit Court of the District of Columbia. In that case the prisoner brought before the Circuit Court had been remanded, but was discharged upon Habeas Corpus issues out of this Court.

It is submitted that the jurisdiction of this appellate court in the cause is not complete until the record is removed as well as the order and judgment of the Judge of the Circuit Court discharging the prisoner from custody and that can only be done by aid of a certiorari in this jurisdiction.

We respectfully submit that this Appeal must be dismissed for want of jurisdicton and upon the merits.

GEO. A. DAVIS,
F. M. BROOKS,
Counsel for Petitioners.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

IN THE MATTER OF THE PETITION OF IHARA ICHIGORO ET AL.

APPEAL.

To the Honorable the Supreme Court of the Territory of Hawaii:

Upon examination of the Records in the within cases we find that Associate Justice The Honorable Antone Perry found true Bills upon the Indictments and presided at the trial of the following cases: THE REPUBLIC OF HAWAII vs. IHARA ICHIGORO, OSAKI MANKICHI, YAMANE NENCHIRO, in the Circuit Court, which are now being considered on appeal, and sentenced and sat in Judgment upon the said cases. We therefore respectfully submit that under and by virtue of Section 84 of The Act to Provide a Government for the Territory of Hawaii, the said Associate Justice is disqualified from sitting as Judge and hearing and deciding the appeal of the Territory in all of the within causes, they having been argued and submitted together as one case on appeal to this Honorable Supreme Court.

Dated this 15th day of August, A. D. 1901.

(Signed) GEORGE A DAVIS,
(Signed) F. M. BROOKS,
Counsel for the Defendants.

No. 942
APR 10 1902

In the Supreme Court

October Term, 1901.

UNITED STATES.

In re Osaki Mankichi on Habeas Corpus

Reply to Argument for Appellant.

BY

GEORGE A. DAVIS and F. M. BROOKS
For Appellee.

HONOLULU:
BULLETIN PUBLISHING CO., LTD.
1902.

IN THE

Supreme Court of the United States

IN RE OSAKI MANKICHI
ON HABEAS CORPUS

APPEAL OF TERRITORY OF HAWAII FROM ORDER OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE TERRITORY OF HAWAII, DISCHARGING PETITIONER FROM CUSTODY.

REPLY OF APPELLEE TO "ARGUMENT FOR APPELLANT."

In reply to the lengthy argument of the Attorney General, in which he seeks to maintain the proposition that all the municipal laws of Hawaii, even though contrary to the Constitution of the United States, remained in force in the Islands after the passage of the Newland's Resolution, and that "there is not a phrase in the "Newland's Resolution which extends the Constitution of the "United States to the Hawaiian Islands" (page 24), we merely wish to state that by the express terms of the Resolution the Hawaiian Islands became and were a part of the United States and "subject to the sovereign dominion thereof." The Resolution povided that "municipal legislation of the Hawaiian Islands, not "enacted for the fulfillment of the treaties so extinguished and not "inconsistent with this Joint Resolution, *nor contrary to the Consti-*"*tution of the United States*, nor to any existing treaty of the "United States, shall remain in force," etc.

The Attorney General's argument resolves itself into the conten-

tion that the provision "nor contrary to the Constitution" means nothing, but should be construed as if it read "nor contrary *and* "*contrary* to the Constitution," but the learned District Judge properly held that he could not legislate such words into the Act and that the words "nor contrary to the Constitution of the United "States" meant what they said and absolutely nullified all municipal legislation "contrary to the Constitution," leaving in force only such laws as were not contrary thereto. We believe this Court will not read out of the Act the words "nor contrary to the Con- "stitution" nor interpolate therein the words "and contrary", but will give the words of the Act their plain meaning, and so believing we rest confident that the order of the District Judge will be affirmed.

Respectfully submitted,

GEO. A. DAVIS AND
F. M. BROOKS,
Counsel for Appellee.

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JAMES H. McKENNEY,
Clerk

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Supreme Court of the United States

October Term, ~~1901~~ 1902

No. ~~512~~ 219.

THE TERRITORY OF HAWAII

Appellant

against

OSAKI MANKICHI

Appellee

ADDITIONAL BRIEF FOR APPELLEE

GEORGE A. DAVIS AND
F. M. BROOKS
Attorneys for Appellee

PAUL FULLER,
F. R. COUDERT, JR.
Of Counsel

Supreme Court of the United States.

THE TERRITORY OF HAWAII,
Appellant,

AGAINST

OSAKI MANKICHI,
Appellee.

OCTOBER TERM,
~~1901.~~ 1902.
No. ~~519.~~ 219.

ADDITIONAL BRIEF FOR APPELLEE.

This is an appeal by the Territory of Hawaii from an order of the United States District Court in and for the Territory of Hawaii, under date of September 12, 1901, upon a writ of *habeas corpus*, discharging from custody the appellee, Osaki Mankichi, who had been convicted of manslaughter in the Circuit Court, for the First Judicial Circuit of the Territory of Hawaii, by the verdict of nine jurors out of twelve (Rec., p. 7).

The trial was had upon a presentment or indictment by the Attorney-General of Hawaii, certified as a true bill by the presiding Judge of said Court (Rec., pp. 8 and 9). This proceeding was in accordance with Sec. 616 of the Penal Laws of 1897 of the Republic of Hawaii (Rec., p. 15).

The verdict of conviction of manslaughter rendered by nine out of twelve jurors was in accordance with Sec. 1345 of the Civil Laws of 1897,

of the Republic of Hawaii. The discharge of the prisoner was granted on the ground that these two municipal laws of the former Republic of Hawaii ceased to be of any force or effect upon the annexation of the Hawaiian Islands "as a part of the territory of the United States and subject to the sovereign dominion thereof" by virtue of a Joint Resolution of the Congress of the United States, approved by the President, July 7, 1898 (30 Stat., 750).

The Joint Resolution referred to, after reciting the consent of the Government of the Republic of Hawaii "to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies," accepted, ratified and confirmed said cession, and provided "that the said Hawaiian Islands and their dependencies be and *they are hereby annexed* as a part of the territory of the United States, and are subject to the sovereign dominion thereof."

The Resolution then provided that "the municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of treaties extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

The resolution further provided that the existing laws of the United States relative to public lands should not apply in the Hawaiian Islands, but that Congress should enact special laws for their management and disposition; that until legislation should be enacted extending United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries should remain unchanged; that there should be no further immigration of Chinese into the Hawaiian Islands except upon the conditions allowed by the laws of the United States; and it then provided for

the appointment of five commissioners "who shall as soon as reasonably practicable recommend to Congress such legislation conerning the Hawaiian Islands as they deem necessary or proper."

The questions before this Court on the present appeal are therefore:

I.—Did the Joint Resolution of Congress, approved by the President on the 7th of July, 1898, repeal and abrogate all municipal legislation of the Hawaiian Islands that was "contrary to the Constitution of the United States"?

II.—Is it or not contrary to the Constitution of the United States that any person should be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, and that in a criminal prosecution a conviction should be had by the verdict of nine jurors?

I.

(1.) It seems to us that this question is answered by its mere statement.

The first canon of interpretation is to take the ordinary meaning of plain and unambiguous language. The language of Congress in the Joint Resolution under discussion is certainly plain and unambiguous, and provides that only that municipal legislation of the Hawaiian Islands "*shall remain in force*" which is "not inconsistent with this joint resolution nor contrary to the Constitution of the United States."

Comment on this paragraph can only, it would seem, confuse or dilute its obvious meaning. It expresses a direct intention in direct language, to wit, that no municipal legislation should "remain in force," should be carried out, should be of any vir-

tue or effect, which was inconsistent with, in contravention of, contrary to, any relevant prescription of the Constitution.

What is a relevant or applicable prescription of the Constitution is the subsidiary question suggested.

Assuming for the moment that some rights are so essential and fundamental that the protection extended to them by the letter or the spirit of the Constitution is everywhere and at all times available, while other rights are artificial or remedial and only protected at such times and such places as the Constitution specifically indicates, we will test the meaning and the application of the Joint Resolution by an enumeration of the rights which depend upon the adoption of certain methods of procedure for their assertion and protection.

> "The right of the people to be secure in their "persons, houses, papers and effects against "unreasonable searches and seizures shall "not be violated; and no warrants shall "issue but upon probable cause supported by "oath or affirmation, and particularly describ-"ing the place to be searched and the persons "and things to be seized" (Art. IV. Amendments).

Here is clearly a right depending upon proper procedure; the search or the seizure must not be "unreasonable"; the warrant must not be issued except upon the oath or affirmation of a complainant, and this oath must be specific as to the place to be searched, the things to be searched for and taken, and the persons to be seized.

Would a municipal law of Hawaii, allowing search warrants and seizures without oath or affirmation, but upon the simple fiat of Attorney-General or Judge, and without particular description of "the place to be searched and the persons or things to be seized," be contrary to the Constitution? Would it "remain in force" after the annexation of Hawaii

under the Joint Resolution which declared that only municipal legislation " not contrary to the Constitu- " tion of the United States should remain in force."

Consider in the same way these provisions:

No person shall be compelled in any criminal case to be a witness against himself (Art. V. Amendments).

The accused shall be informed of the nature and cause of the accusation (Art. VI. Amendments);

He shall be confronted with the witnesses against him (Art. VI. Amendments);

He shall have compulsory process for obtaining witnesses in his favor (Art. VI. Amendments);

He shall have the assistance of counsel in his defense (Art. VI. Amendments);

Would Hawaiian legislation compelling the accused to testify against himself; refusing him information as to the nature and cause of the accusation against him; taking testimony against him by depositions of witnesses with whom he was not confronted; denying him compulsory process to obtain witnesses in his favor and not allowing him the assistance of counsel in his defense, " remain in force " under the Joint Resolution?

All these relate to what Justice Brown in *DeLima v. Bidwell*, 182 U. S., p. 282, classifies as " artificial or remedial rights," as " particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo Saxon Jurisprudence," and which do not, as then decided, necessarily attach to territory annexed by a mere treaty cession.

But can there be any doubt of the power of Congress to attach them to such territory, or any doubt of the intention of Congress so to attach them by the beneficent provision of the Joint Resolution?

The question is important and further illustration is not out of place.

The Constitution prescribes that " no per- " son shall be convicted of treason on the tes-

"timony of two witnesses to the same overt "act" (Art. III., Section 3).

"No person shall be deprived of life, liberty "or property, without due process of law; nor "shall private property be taken for public "use without due compensation" (Art V., Amendments).

Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the Legislature and without process, or confiscating private property for public use without compensation remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?

In what way does the right claimed by the appellee differ from the rights enumerated above?

The trial of all crimes shall be by jury (Art. III., Section 2):

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" (Art. V., Amendments).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury" (Art. VI., Amendments).

The rights protected by these provisions are no more "artificial and remedial," no more dependent upon "particular methods of procedure" than the instances already presented, and we respectfully submit that they stand the test imposed by the language of the Resolution—any law infringing them is "contrary to the Constitution"; in other words, such a law ignores the existence of a right capable of assertion against any agency of the Federal Government; and Congress chose to invest

the inhabitants of Hawaii with such constitutional rights.

Further illustration with reference to those more broadly recognized human rights which have occasionally been referred to as "Natural rights," essential or fundamental rights, would seem to be unnecessary, especially as the distinction between such rights and what we have accepted for the moment as merely "artificial or remedial rights" is wavering and uncertain. A recapitulation, however, may not be out of place by way of emphasis.

Surely legislation of Hawaii prescribing that a man may be held to involuntary servitude otherwise than as a punishment for crime; any legislation respecting an establishment of religion or prohibiting the free exercise thereof; abridging the freedom of speech or of the press, or of the right of the people peaceably to assemble; prohibiting the people to keep and bear arms; permitting soldiers to be quartered in any house without the consent of the owner in time of peace; permitting the requirement of excessive bail, the imposition of excessive fines and the infliction of cruel and unusual punishments; prescribing a religious test as a qualification for any of the civil, judicial or military offices of the existing government in the Hawaiian Islands, which by the resolution were vested in such person or persons as the President of the United States might designate; any legislation prescribing that the right to vote shall be denied to Caucasians, would surely be contrary to the Constitution and come under the ban of the Joint Resolution and cease to be of any force or effect.

(2.) Another rule of interpretation which does not require citation of authority in this Court is that effect is to be given to every portion of a statute; that all the language used in a statute is presumed to have been used for effective purpose and that interpretation will be sought and sustained which gives to every provision an actual effect.

Any attempt to circumscribe or diminish the plain intent and purpose of the unequivocal language, "nor contrary to the Constitution of the United States," is equivalent to the elimination of those words from the Joint Resolution.

It has been intimated that there are certain "fundamental" rights which of necessity attach to all territory and to all people under the jurisdiction of the United States, and that those rights became at once enforcible in the Hawaiian Islands upon their annexation to the United States, but that certain other prescriptions of the Constitution are only meant to apply to territory which has assumed some other relation to the Federal Union than that of merely annexed territory.

There might under other circumstances be room for discussion of such a proposition, but to advance such a proposition as applicable to the present case, in presence of the broad language of the Resolution,—that no municipal legislation should "remain in force" that was contrary to any prescription of the Constitution, would be to adopt a rule of interpretation contrary to that which has been universally accepted,—a rule of interpretation which could be used to diminish, if not to abolish, every protection intended to be secured by Constitutions or by Laws.

Whatever questions might arise as to the protection due to denizens of annexed territory, under other circumstances,—such as mere acquisition without any action of Congress,—or as to the propriety or the justice of extending to such annexed territory provisions of law and of constitutional rights originally intended for people of the Anglo-Saxon race and brought up under the liberalizing influences of Magna Charta and the common law, it is manifest that in the instance of Hawaii, Congress intended that there should be no room for discussion, and intended to confer upon its inhabitants every constitutional privilege, immunity and protection which the Constitution enjoins upon

or empowers the Federal authority to extend, to all under its administration.

To hold otherwise is to expunge from the Resolution the saving clause which ensured to every American citizen who chose to go into the new territory the protection which Congress meant to attach to it instantly, and as the unavoidable condition of its annexation.

(3.) Another rule of interpretation is a comparison of this Act of Congress with other Acts of the same body, meant to convey or to withhold from given territory, rights such as we claim to exist in the case at bar.

The Organic Law of Iowa came under consideration in the case of Webster *v.* Reid, 11 How., 460, and it was there held that the VIIth Article of the Amendments giving the right to trial by jury in all common law cases, was in force in Iowa because the Organic Law had by express provision and by reference extended the Ordinance of 1787 over the territory and the Laws of the United States as far as they were applicable.

The language of the Organic Act (5 Stat., 235, Sec. 12) is as follows:

> "That the inhabitants of the said Territory
> "shall be entitled to all the rights, privileges
> "and immunities hereinbefore granted and
> "secured to the Territory of Wisconsin and
> "its inhabitants, and the existing laws of the
> "Territory of Wisconsin shall be extended
> "over said territory so far as the same be
> "not incompatible with the provisions of this
> "Act."

The Organic Act of Wisconsin (5 Stat., p. 10, Section 12) provides:

> "That the inhabitants of the said Territory
> "shall be entitled to enjoy all and singular
> "the rights, privileges and advantages granted
> "and secured to the people of the territory of

"the United States Northwest of the River "Ohio, by the articles of compact contained "in the Ordinance for the government of the "said territory passed on the 13th of July, "1787." And that Ordinance provided that "the inhabitants of the said territory shall "always be entitled to the benefits of the writ "of *habeas corpus* and of the trial by jury," and that "no man shall be deprived of his "liberty or property but by the judgment of "his peers" (Article II.).

We submit that though this language is more extensive it is not more comprehensive than the simple language of the Joint Resolution providing that the "municipal legislation of the Hawaiian Islands, not contrary to the Constitution of the United States, shall remain in force." Especially when the Joint Resolution adds to this particular exceptions and designates certain legislation which shall remain in force, such as the customs laws.

The Organic Law of Utah (9 Stat., 453), provides in Section 6 that the legislative power of the territory shall extend to all rightful subjects of legislation "consistent with the Constitution of the United States and the provisions of this Act," and in the final section of the Law (Section 17) it is further provided that the "Constitution *and laws* of the United States are hereby extended to and declared to be in force in said territory of Utah so far as the same, or any provision thereof, may be applicable."

The same comment may be made upon this that was made upon the Iowa Act. The expression of the intention of Congress is amplified, but it is not strengthened; it embraces no more, although it takes more words to do it.

The Organic Law of Hawaii (30th April, 1900, 31 Stat., 141) devotes two sections to the re-enactment of the provision of the Joint Resolution:

"SECTION 5. That the Constitution, and "except as hereinafter provided, all the laws

> " of the United States which are not locally
> " inapplicable, shall have the same force and
> " effect within the said territory as elsewhere
> " in the United States, provided that Section
> " 1850 and Section 1890 of the Revised Statutes
> " of the United States shall not apply to the
> " Territory of Hawaii."

The necessity for this amplification is seen in the fact that not the Constitution alone but "the laws" of the United States were being made applicable, and not all of these, but with exceptions that had to be duly noted.

But to make assurance "double sure" Congress did not content itself with this provision as to the Constitution, but had recourse in another Section to language identical in purpose and meaning with the language of the Joint Resolution, to wit:

> " SECTION 6. That the laws of Hawaii not
> " inconsistent with the Constitution or laws
> " of the United States, or the provisions of
> " this Act, shall continue in force, subject to
> " repeal or amendment by the legislation of
> " Hawaii or the Congress of the United
> " States."

The only difference between this and the provisions of the Joint Resolution is that the Resolution refers to legislation not inconsistent with the Joint Resolution, and the Organic Act of 30th April, 1900, refers to legislation not inconsistent with the provisions of the Act, but the language by which the legislation of Hawaii was abrogated or allowed to remain in force was in nowise different from the language of the Joint Resolution; the one said "not contrary to the Constitution" and the other "not inconsistent with the Constitution."

We may now contrast the language of the Joint Resolution, making the Constitution of the United States the test of the validity of legislation, with the

action of Congress when it had no intention of applying this test.

The Foraker Act, April 12, 1900, provided for the civil government of Porto Rico. The question of constitutional rights and immunities was paramount in the public mind and dominated the discussions in Congress; and Congress provided (Section 8), "that the laws and ordinances of Porto Rico now in force shall continue in full force and effect except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, *and so far as the same are not inconsistent or in conflict with the statutory laws of the United States*, not locally inapplicable, or the provisions hereof."

Civil Government for the Philippines was provided by the Act of July 1, 1902, and the same question of constitutional privileges was still paramount in the public mind. Congress met the situation, not by the simple and sweeping provision of the Joint Resolution concerning Hawaii, but, by the adaptation of such a Bill of Rights as it considered proper for the Islands, which was embodied in Section 5 of the Act and insures to the inhabitants the equal protection of the laws and due process of law; protects accused against excessive bail, against being compelled to testify against himself and gives him the privilege of counsel and of confrontation with the witnesses against him, but does not secure to him the protection of a grand jury nor the privilege of a trial by his peers.

Had Congress so desired and so intended, the Joint Resolution could have been expressed in the language of the Porto Rico or the Philippine Act, and we submit that it suffices to place the two in juxtaposition, to make certain that it was the plain intent of Congress from the moment that it made Hawaii a part of our domestic territory to carry there every provision of the Constitution which could in any way be invoked or made applicable.

The reason for this distinction is apparent in the history of the Hawaiian Islands, and in the fact of its American colonization and the prevalence there of the rules of the Common Law.

II.

Is it or not contrary to the Constitution of the United States that any person should be held to answer for a capital crime unless on a presentment or indictment of a Grand Jury, and that in a criminal prosecution a conviction should be had by the verdict of nine members of the jury?

THE GRAND JURY.

> Art. 5. of the Amendments is in precise language: "No person shall be held to an- "swer for a capital or otherwise infamous "crime unless on a presentment or indict- "ment of a Grand Jury."

In *ex parte* Bain, 121 U. S., p. 1, the Supreme Court has held that this prescription of the Constitution is not observed when an indictment found by a Grand Jury is amended by the Court, even by striking out what the Court calls surplusage. Compliance with the constitutional requirement demands the untrammeled action of the Grand Jury and an indictment which expresses that action in its integrity.

> "There is the positive and restrictive lan- "guage of the great fundamental instrument "by which the National Goverment is organ- "ized, that no person shall be held to answer "for such a crime 'unless on a presentment "'or indictment of a grand jury'" (p. 6).

"It is never to be forgotten that in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject and were imbued with the common law estimate of the value of the Grand Jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did * * * in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the Court to try the petitioner for the crime with which he was charged" (pp. 12 and 13).

THE PETIT JURY:

In Thompson *v.* Utah, 170 U. S., at page 349, the Court says: "The next inquiry is whether the jury referred to in the original Constitution and in the VIth Amendment is a jury constituted as it was at common law of twelve persons, neither more nor less. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, &c., 'but, by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. * * * When Thompson committed the offense of grand larceny in the Territory of Utah—*which was under the complete jurisdiction of the United States for all purposes of government and*

"*legislation*—the Supreme Law of the land
" required that he should be tried by a jury
" composed of not less than twelve persons"
(p. 350).

" When Thompson's crime was committed
" it was his constitutional right to demand
" that his liberty should not be taken from
" him except by the joint action of the Court
" and the unanimous verdict of a jury of
" twelve persons" (p. 351).

To the same effect is

Springville *vs.* Thomas, 166 U. S., 707.

We recall the warning given on occasions by this Honorable Court against over quotation from their own decisions and refrain from what Justice Miller called the " vainest show of learning " by further citations in support of these now elementary propositions.

If the Joint Resolution of Congress meant anything, it surely meant that instantly upon the annexation of the Hawaiian Islands no legislation in any way contrary to the Constitution of the United States, in any way interfering with the personal rights of life, liberty or property should " remain in " force."

That it had the power to do this has not been questioned. That it did this cannot be questioned.

The Insular Cases which have been cited to sustain a contrary proposition, did nothing more than to assert the omnipotent power of Congress over annexed territory; its power to grant or to withhold constitutional privileges, rights and immunities; this is not the time to quarrel with or question the doctrines there asserted, for, such as they are, they do not interfere with the rights of Mankichi, the appellee herein. In his case the power attributed to Congress was exercised and the conditions upon which the Hawaiian Islands were

to be received as part of our domestic territory were plainly stated and their plain statement carried to every person accused of crime in the Hawaiian Islands after the annexation and the operation of the Joint Resolution, the right to be accused by a Grand Jury and the right to a trial by a Common Law Jury of twelve men.

If this be true the decision of the learned Judge of the District Court in Hawaii was sound, and the order discharging the prisoner from custody should be affirmed.

Dated New York, February 24th, 1903.

GEORGE A. DAVIS, and
F. M. BROOKS,
Attorneys for Appellee.

PAUL FULLER,
F. R. COUDERT, JR.,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 219.

THE TERRITORY OF HAWAII,
Appellant,

AGAINST

OSAKI MANKICHI,
Appellee.

Appeal from the District Court of the United States for the District of Hawaii.

Brief for the prisoner, the Petitioner-Appellee.

I.

Statement of the Case.

This is an appeal by the Territory of Hawaii from an order made by the District Court of the United States for that Territory (Estee, J.) discharging Osaki Mankichi, the petitioner, from further imprisonment under a conviction for manslaughter by the Circuit Court of Hawaii on the ground that his trial had been in violation of the Constitution of the United States.

The petitioner was admitted to bail pending this appeal by the Territory, but being without sufficient means

to furnish bail ($5,000) he is and has since May, 1899, been in jail.

The facts may be briefly stated.

On the 4th day of May, 1899, a presentment was filed against Osaki Mankichi, the appellee, by the Hon. A. Perry, then Circuit Court Judge of the Territory of Hawaii, charging him with the crime of murder. On this presentment, during the same (May) term, he was tried and found guilty of manslaughter in the first degree by nine jurors, three dissenting (Rec., p. 7). The law in force in Hawaii when the island was annexed provided for a trial on information without a Grand Jury and for conviction upon a vote of nine of the petit jury.

The indictment was found "in the name of the Republic of Hawaii" (Rec., p. 3), which had then ceased to exist in substance and in name. The record of the trial is also in the name of "The Republic of Hawaii" (p. 7), whose posthumous dignity alone can have been assailed by Mankichi. The Republic itself had no entity, except perhaps as a pious souvenir, a cherished sentiment for those days when the citizens of Hawaii were free from the trammels of the Constitution of the United States.

The mittimus (p. 3) is addressed to "Arthur M. Brown, Esq., Marshal of the Republic of Hawaii" (p. 3), although it was issued in May, 1899, *i. e.*, nine months after the surrender of Hawaii's sovereignty to the United States.

The appellee was nominally discharged from confinement by Judge Estee, District Judge of the United States in and for the Territory of Hawaii, September 12, 1901 (Record, p. 17), but is still in custody, the appeal to this Court and his inability to furnish bail having prevented his actual release. The learned District Judge, in a terse and lucid opinion, held that since the passage of the Act of Congress annexing the islands and the transfer of sovereignty to the United States, the portions of the Constitution prescribing indictment and jury trials in criminal cases applied to Hawaii, especially in view of the

provision of the Act continuing in force the municipal law of Hawaii not "contrary to the Constitution." The question is there clearly presented and we can do little more than elaborate the arguments there outlined.

The following dates are important to bear in mind:

1. The Act of Congress annexing Hawaii (the Newlands Joint Resolution), was approved July 7, 1898.

2. Surrender of sovereignty and possession was effected August 12, 1898 (Solicitor-General's Brief on submission, p. 35).

3. Conviction of petitioner was had in May, 1899.

4. Act organizing the government of the Territory, June 14, 1900.

5. A proposed Treaty of Annexation, alleged by the counsel from Hawaii to be of September 11, 1897. (Dole's Brief, p. 11, on submission.)

II.

Jurisdiction.

The question of jurisdiction is fully discussed in the opinion of the learned Judge below, and also in the brief heretofore filed (on submission) by our associates.

As was stated by the former,

> "this is a federal question raised in the territory
> "of the United States which is governed by Fed-
> "eral law under the Constitution and statutes of
> "the United States." Rec., p. 11.

The Appellee claims that he is held by the authorities of Hawaii in plain violation of Articles V and VI of the Amendments to the Constitution, which are as follows:

"ARTICLE V.

"No person shall be held to answer for a capital, "or otherwise infamous crime, unless on a present- "ment or indictment of a Grand Jury, except in "cases arising in the land or naval forces, or in the "Militia, when in actual service in time of War or "public danger; nor shall any person be subject for "the same offence to be twice put in jeopardy of "life or limb; nor shall be compelled in any Crim- "inal Case to be a witness against himself, nor be "deprived of life, liberty, or property, without due "process of law; nor shall private property be taken "for public use, without just compensation."

"ARTICLE VI.

"In all criminal prosecutions, the accused shall "enjoy the right to a speedy and public trial, by "an impartial jury of the State and district wherein "the crime shall have been committed, which dis- "trict shall have been previously ascertained by "law, and to be informed of the nature and cause "of the accusation; to be confronted with the wit- "nesses against him; to have compulsory process "for obtaining witnesses in his favor, and to have "assistance of counsel for his defence."

And also section two of Article III, which declares

" The trial of all crimes, except in Cases of Impeachment shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed."

Whatever question there may be as to the validity of this claim can only be determined by an inspection of the Record, which inspection will alone make it possible to decide whether or not the Constitution is violated in

the person of the Appellee. That decision will determine the merits of this controversy as well as the technical point raised—but not pressed—as to the jurisdiction.

If it should appear that the Constitution of the United States does not govern or apply to the Hawaiian territory, the Appellee is without remedy in this proceeding. If, on the contrary, this Court shall be of opinion that the ordinary meaning of the English language is to control in the construction of the Newlands Resolution, and that Congress was lawfully exercising its power when it fixed the conditions upon which Hawaii should be received as part of the territory of the United States, then, we submit, jurisdiction exists. In that event, both questions being resolved in the Appellee's favor, the decision rendered below should be affirmed.

The cases cited by Mr. Dole (argument, p. 5, on submission) do not apply. The Court there simply pronounced against "the review by habeas corpus of the judgments of *State Courts* in Criminal Cases." This distinction was in the mind of the learned District Court Judge (Judge Estee) and is made clear in his opinion.

III.

Brief of the Argument.

It may be conducive to the convenience of the Court to have in very brief outline a summary of our contentions.

The proposition upon which we rely and the soundness of which is determinative of this case is

From the moment the annexation of the Hawaiian Islands became complete and they passed under the sovereignty and jurisdiction of the United States by virtue of the Act of Congress of July 7th, 1898, no citizen or inhabitant thereof could "be held for a capital or otherwise infamous crime unless on presentment of a grand jury," nor be convicted for such crime without a unanimous verdict of a petit jury.

The reasoning in support of this proposition may be summarized as follows:

A.—Hawaii was annexed by act of Congress and not by treaty, hence much, if not all, of the judicial discussions in the opinions in the Insular Cases can have little or no relevancy to Hawaii.

That Congress has full power to acquire and annex foreign territories, and to provide for the government thereof is not disputed, nor can it be disputed that it is competent for Congress to extend to the inhabitants of the territories annexed the privileges and protection of the Constitution of the United States.

It was the intention of Congress to extend the protection and privileges of the Constitution, including Jury Trial, to Hawaii from the moment it came under the sovereignty of the United States.

This intention is manifest both from the language of the Act of Congress (Newlands Resolution) extending the Constitution to Hawaii, and also from the history of the islands which shows them to have been American in institutions and law since 1847, at which time the Government of the United States was prevented by mere accident from admitting Hawaii into the Union as a State.

B.—Congress having full power to annex did so, and the conditions of the annexation must be sought in the law annexing the islands. The question is thus one involving the construction of a municipal statute, and has no relation to questions arising between two sovereign States under a treaty, nor is it affected by any rules of the "law of nations."

The act of Congress not only annexed the Islands, but provided a code of municipal legislation by which the Islands should be governed "until the Congress of the United States should otherwise determine."

The act abrogated at once all treaties of the Hawaiian Islands with foreign nations, and all municipal legislation enacted for the fulfillment of such treaties, and all legislation which was *"contrary to the Constitution of the United States,"* or to any existing treaty of the United States; but with these exceptions all other municipal legislation of the Hawaiian Islands, the act declared "shall remain in force until Congress shall otherwise determine."

C.—The opinions of the majority of the Court in the Insular Cases fully support the proposition that the action of Congress in extending the full operation of the Constitution to that territory made it unlawful to conduct criminal trials save as prescribed by the III Article and by the Fifth and Sixth amendments to the Constitution of the United States. Conformity to these Constitutional requirements was readily attainable under then existing Hawaiian Law.

D.—The proposition (relied upon by the Solicitor-General) that the language of the Act does not affect the legal situation and leaves it just where it would have been had Congress been silent on the subject, is fallacious both in its premises and conclusion. The plain language of the Newlands Resolution was to put in operation in the Hawaiian Islands all the provisions of the Constitution enforceable anywhere in the United States.

E.—The argument *ab inconvenienti* can have no application here.

The Criminal Courts in Hawaii have had criminal law jurisdiction for more than half a century; they had power to empanel a grand jury and to instruct the petit jury of twelve before whom this case was tried that conviction could only be had by unanimous verdict.

Congress knew this and must have intended to make trials there conform to those conducted elsewhere under Federal authority. Such intention indicates an appreciation of the real situation and not a desire to empty the jails, as the eminent counsel from Hawaii seems to fear.

THE ARGUMENT.

IV.

How Hawaii became part of the territory of the United States.

The annexation of Hawaii was brought about by an Act of the Congress of the United States in the form of a Joint Resolution approved July 7, 1898 (printed in full as an appendix to this brief). The preamble recites the consent of the Government of Hawaii to cede its sovereignty over the islands, and then follow the clauses of the Act directly pertinent to this case.

> "Resolved, by the Senate and House of Representatives, etc., That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof. * * * The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations.
>
> *The municipal legislation of the Hawaiian Islands,* not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

It would seem unnecessary to spend much time, or any time at all, upon this question, were it not that a singular misapprehension pervades the argument of the learned Counsel from Hawaii and perhaps misleads him into wrong conclusions. It is therefore with a view

to clearing away some preliminary questions which, while they do not go to the root, may tend to obscure the question that we dwell somewhat upon the argument of the learned Counsel from Hawaii.

If he is correct in his statements made with impressive iteration, Hawaii being a sovereign state entered into a "Treaty of political union" with the United States "and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America," Hawaii yielded up its sovereignty and public property to the latter power. (See Dole's Argument on Submission, pp. 12 and 13).

As we can find no evidence of any Treaty, it might be enough to state that no such Treaty exists or then existed. Solemn agreements between independent nations are not lost or mislaid, certainly not by both parties to the contract. Some evidence should be adduced to substantiate the assertion that such an instrument had been duly executed by the parties respectively interested. But not only does the Counsel insist upon its existence, but he depends mainly, if not wholly, upon the effect of this unproved and invisible treaty to defeat the contention of the Respondent in his effort to regain his liberty.

> "The Hawaiian Islands," he says (at page 14 of the Brief on submission) "ceased to be an independent nation in 1898. They did not become an organized territory of the United States until 1900. There was a transition period, unless, for a period of about two years, they were deprived of the legitimate protection of civilized government. *They safeguarded against this calamity by Treaty,* made while they were a sovereign nation. It was one of the principal conditions of their surrender of sovereign rights. It was a *retention of powers expressly reserved.*"

There is nothing very remarkable about this sentence except the number of fallacies that have been crowded into so small a compass. There was *no* transition pe-

riod, Hawaii was *not* deprived of the legitimate protection of civilized government, there was *no* safeguard by Treaty for there was *no* Treaty, there was *no* principal, or any condition in the surrender of sovereign rights, there was *no* retention of powers expressly reserved.

This learned Court may perhaps be disposed to consider the above as purely verbal criticism, and while holding that there was no annexation by Treaty, the language of the counsel from Hawaii may be taken to mean only that the cession to and acceptance by the United States was equivalent to a Treaty of Annexation and that practically the result is the same as though he had not resorted to the fiction of a Treaty as that expression is usually and properly understood. This may be the just and reasonable way of dealing with extravagant forms of speech in which counsel are apt to indulge and for which all of us must at times look to the Court for kindly forbearance.

But it is evident that the learned counsel means more than this and that he derives apparent comfort from this non-existent and unseen compact. Wherein his case is improved by such an assumption, we are not able to see, but it does not follow that our incapacity in this respect will be shared by the Court. It seems to us that the case for the respondent would be quite as strong if a Treaty had been made in the manner and form provided by the Constitution and *followed by an Act of Congress*, such as the Newlands Resolution. However this may be, we prefer to deal with facts as they are, not overtrusting our ability to meet ingenious and earnest arguments based upon a fallacy. It is well, therefore, to bear in mind that all that was done was done by Congress itself and not by the Treaty-making power.

The learned Solicitor-General throws some light on the subject of the Treaty in his brief (on submission, p. 7), but not as much as might have been hoped for. He evidently does not attach the same importance to this mysterious instrument as his colleague from Hawaii.

> "By the Treaty of Annexation which was formally consented to by the Republic of Hawaii

> and submitted to this country, a cession was proposed upon certain terms and conditions which were stated. By the passage of the resolution of annexation the offer of cession was accepted and the islands annexed 'as a part of the territory of the United States' upon the terms stated in the Treaty and incorporated in the resolution, which is printed in the appendix."

The so-called "Treaty" to which the learned counsel refers was only "consented to" by the Republic of Hawaii and *"submitted"* to this country. It is plain that it never took the shape of a Treaty, that it was not accepted by the President and Senate in the usual and regular form and can be called a Treaty only on the theory that one party may execute such an agreement without a like execution by the other party. If so, our legal vocabulary must be revised and we must admit the idea of a "unilateral treaty," a novelty up to this date and a creature of the imagination of the learned counsel for the Territory of Hawaii. If we turn to the act of cession and its terms we find no mention of any such instrument. It may be, as the learned Solicitor-General states that "the terms stated in the Treaty 'were' incorporated in the resolution," but there is certainly no evidence of this, or that Congress had ever heard of the Treaty in the acceptance of the cession. For some reason or other, Congress acted precisely as though no such agreement or compact had ever been made.

When the learned counsel, the Attorney-General for Hawaii, lays great stress upon his Treaty he must be actuated by the belief that his position would be strengthened were there in fact such a situation as he described previous to the cession, or by the difficulty which he may experience in seeking to justify an absolute cession with the limited authority conferred by Article 32 of the Constitution of Republic of Hawaii. That section provides that

> "The President, with the approval of the Cabi-

net, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of America, subject to the ratification of the Senate."

Possibly the learned counsel who played so important a part in the transfer of Hawaii to the United States may deem it necessary to maintain that the power to make such a Treaty involved the authority to erase the name of the Republic from the nations of the world. It may be that the cession of Hawaii's sovereignty, territory and property was embraced in the expression "a treaty of political union." He certainly so claimed to the last, for when he dug the grave of the little Republic and pronounced its funeral oration he deliberately informed his hearers that "a treaty of political union had been made," whereupon "the Hawaiian band played Hawaii Ponoi for the last time, *taps were sounded* and the Hawaiian flag came down and was taken possession of by the Hawaiian Corporal of the Guard."

If the so-called Treaty was effective for nothing else, it was quite conclusive as putting an end to the late Republic. Its act of self immolation was complete; from that moment it became a memory; it stands as a *magni* (or parvi) *nominis umbra* never again to be counted among the nations as a sovereign power. However interesting the traditions of the early Kamehamehas may be, not to speak of the fame of their more recent successors, they belong solely to history and can create no rights when "the new master has spoken."

V.

The Reluctance of Hawaii to accept the situation created by its own act.

It is possible that the citizens of the Republic of Hawaii did not quite realize the situation created by this Treaty of Political Alliance. Even so high an officer as Mr. Brown, "the high sheriff of the Territory of Hawaii," alleges in defence of the imprisonment of Mankichi that "the provisions of Articles V and VI of the Amendments to the Constitution of the United States relating to presentments and indictments by grand juries and to trial by petit juries were not in force and effect *within the Republic of Hawaii* or the Hawaiian Islands, nor applicable thereto at the time of the indictment, trial and conviction of said Osaki Mankichi." He avoids any mention of the "Territory of Hawaii," although the conviction was had "in the Circuit Court of the first circuit Territory of Hawaii." (Rec., p. 7.)

Attorney-General Dole insists that "there was a retention of powers expressly reserved" (p. 14 argument on submission) and proclaims that he stands on "treaty rights" (p. 38). "At the same time that the flag was raised on the Government house what is *said to be the same flag that was lowered* by order of Commissioner Blount from the Judiciary Building, was raised there." (Sewall to Day, Aug. 15, 1895; App. to Solicitor General's Brief on Submission, p. 44.)

On the same day that the cession was formally consummated "a proposition was *made and strongly endorsed*" to have the Hawaiian flag raised on one of the staffs as a territorial or local flag, but Minister Sewall refused his permission on the ground that his instructions did not make it possible. While the officers of the Republic took a solemn oath to support and defend the Constitution of the United States, they objected to the addition of an oath of office on the ground that they were not elected or appointed under the President of the United States.

In the absence of instructions, Minister Sewall did not insist upon the oath. Finally, the claim was made that Hawaii might establish a coast-wise trade and the flag of Hawaii flown, the same flag that had been taken down and superseded by the flag of the United States. There may be nothing remarkable in this attempt to ignore accomplished facts and to continue the dead past as though it were a living reality. Laymen, business men, dissatisfied citizens might be excused for such a mistake, but the case becomes more remarkable when we find that the Supreme Court of the Territory on the 5th day of June, 1899, held that Hawaii could register vessels although the Territory was annexed to and formed part of the United States. But the Attorney-General of the United States declined to take this view:

> "With due respect to the judgment of the Supreme Court of Hawaii, I am unable to admit that an Hawaiian register can now be issued to a vessel and the flag of Hawaii, the usual token of registration be flown by her." (Rec. Judge Estee's Op., p. 12.)

These facts are perhaps of themselves unimportant and may throw little light upon the question really involved; but their recital may be interesting and of some value, in view of the argument of Attorney-General Dole and as explaining the earnestness with which he seeks, with others, to minimize or neutralize the importance of Hawaii's absolute and unqualified surrender and unconditional annexation by Act of Congress.

VI.

The Power of Congress.

The power of Congress to deal with newly acquired territory has been held to be absolute and almost unlimited. (Insular Cases, 182 U. S.) What the source of that power is or may be it is unnecessary to inquire; so long as the conclusion is fixed that the power exists. The power of Congress is frequently referred to as a plenary power over the territories of the United States.

> "Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated under the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by any direct and express application of its provisions." Mr. Justice Bradley in Mormon Church Case, 136 U. S., p. 44.

It will probably not be claimed that where in addition to these inferences and this reliance upon the general spirit of the Constitution we have express terms showing that Congress intended to apply the Constitution, and the whole of it, to the territories, the case is any weaker for that reason.

> "The doctrine laid down in Murphy *v.* Ramsey and the Mormon Church case," says Mr. Butler, in his recent and excellent work on the Treaty Making Power, "that the power of the United States to govern territory is plenary, has been constantly affirmed and followed by the United States Supreme Court. Chief Justice Waite and Justices Field and Matthews have delivered and concurred in opinions sustaining this plenary power."

Mr. Butler also quotes to the same effect the strong

language used by Mr. Justice Gray in Shively *v.* Bowlby, 152 U. S., 1, p. 48, in which he says:

> "By the Constitution, as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories so long as they remain in a territorial condition."

A further citation of authorities, however creditable to the industry of counsel would add no further light to the subject. Indeed the principle laid down not only expresses the law upon the subject as it must strike enlightened jurists, however they may differ as to the applicability of particular limitations of the Constitution, but will also stand the test of common sense.

It is obvious that when by conquest or by amicable cession the territory of one people is transferred to the people of another there must be some power in the new sovereign to govern the incoming territory and that power can, from the very nature of things, be placed under no other authority than that of Congress.

It may even be granted that the treaty-making power is not competent to incorporate acquired territory into the United States so as to make it a part thereof unless Congress has in some form expressly or impliedly consented thereto. Opinion Justice White in Downes *v.* Bidwell, 182 U. S., 287 *et seq.*

We may even go so far as to hold that where a Treaty might contain a provision incorporating newly acquired territory, Congress might accept the cession and reject the condition. In other words, it may be, and this hypothesis has the sanction of eminent and learned Justices of this Court, that Congress is the final arbiter without whose decision foreign territory cannot become part of the United States in a domestic sense. But however interesting the discussion may be it cannot give us any aid in the present case, for none of the questions which have thus far taxed the learning and experience

of our judges will be found to embarrass us when we remember that Hawaii was acquired without the intervention of any other power, that its cession was voluntary and absolute, that its surrender of sovereignty was without reservation, and that the actor on the part of the United States was Congress.

The cession was therefore not the work of the President and Senate alone; it was the work of *both branches of the National Legislature,* and the sole question remains whether Congress intended by the language of the Joint Resolution forbidding the enforcement of municipal laws "contrary to the Constitution," to extend to those islands the benefits of the Fifth and Sixth Amendments of the Constitution of the United States.

There are but two instances in our history of a cession by a foreign country of all its territory, sovereignty and rights to the United States, namely, the cases of Texas and Hawaii.

The fact that the latter cession was so absolute and complete as to destroy and put an end to the nationality of the ceding nation, may explain why the Treaty proposed by Hawaii and denominated by Governor Dole a "Treaty of Political Alliance," was not accepted. The surrender could easily be made, as the result has shown, without the intervention of diplomacy. There certainly could be no object in incurring or pretending to incur international obligations to a nation that signed its death warrant when it executed the transfer of its sovereignty to the United States under an Act of Congress. Granting that the United States should fail to carry out its obligations, who is to enforce them when the only party concerned and interested was forever estopped from raising its voice? If Congress would have been at liberty to impose burdens upon Hawaii even after the execution of the supposed Treaty and in defiance thereof, how much stronger the case where Congress originally and alone dealt with the subject.

VII.

What Congress Intended.

It was the manifest intention of Congress in dealing with Hawaii to provide for so absolute and complete a transfer of dominion that no question should thereafter arise upon that subject. If Congress failed in this particular, the failure must be attributed to an imperfect vocabulary and not to a doubtful intention. The text of the Joint Resolution of July 7, 1898, recites that the Republic of Hawaii in due form signified

> "its consent in the manner provided by its con-
> "stitution to cede absolutely and without reserve
> "to the United States of America all rights of
> "sovereignty of whatsoever kind in and over the
> "Hawaiian Islands and their dependencies, and
> "also to cede and transfer to the United States the
> "absolute fee and ownership of all public, govern-
> "ment, or crown lands, public buildings or edifices,
> "ports, harbors, military equipments, and all other
> "public property of every kind and description be-
> "longing to the government of the Hawaiian
> "Islands, together with every right and appurte-
> "nance thereunto appertaining."

This cession was accepted and by the act itself the Hawaiian Islands and their dependencies were "annexed as a part of the territory of the United States subject to the sovereign dominion thereof." It is not necessary to argue that when all rights are ceded absolutely and without reservation, that there are any rights left in the grantor, or that he retains any interest in the buildings and property which he has transferred in the language above cited. Nor is it necessary probably to argue that when the Hawaiian Islands were annexed as a part of the territory of the United States they actually became a part of the territory of the United States and that when they consented to become subject to the dominion thereof, their own sovereignty was merged, lost

and disappeared. It might be an interesting exercise of ingenuity for a philologist to endeavor to make the intention clearer; he would probably fail.

Another and equally clear intention seems to have been the protection of the Hawaiian residents by insisting that no municipal legislation should be tolerated which contravened in any way the Constitution of the United States; not a part of the Constitution for none of it is excepted, but the whole of it as far as any of its provisions by the most generous interpretation may be made applicable.

It did not occur, we may safely assume, to the men in the Senate and in the House or to the President of the United States that the extension of this Constitution would be assailed as an injury or denounced as a breach of trust. There are some subjects in this country upon which the language of eulogy is frequently stretched until it cracks.

> "There is no grander subject for study, no nobler theme for literature, than the Constitution of the United States, not only from historical, but also from ethical and ethnical points of observation; it is no wonder, therefore, that it has been the subject of thought, study and expression of opinion by many of the ablest legal scholars in our own country, and also in those other countries, where the practical operation of the Constitution was watched, at first with doubt, and afterwards in wonder and with admiration." (Grandeur of the Constitution as a Subject for Study; Butler on Treaty-Making Power, p. 72.)

The Constitution has been described as a work so perfect and admirable as to bear on its face the evidence of almost divine inspiration. Its makers have been glorified as benefactors of the human race and we have been most of us brought up to consider that those countries in which the people did not have that Constitution as a shield were less favored than ourselves.

It never can have occurred to our law-makers that they were violating the trust of Attorney-General Dole and perhaps of others and the obligations of friendship, honor and justice by correcting whatever there might be in the Islands of Hawaii that required correction, through the introduction of an Act which made a Nation of these States. It is curious, too, that this idea never suggested itself to the learned counsel, who was a *magna pars* in the annexation, that his people could be otherwise than gainers if the Constitution were to take effect instantly upon the demise of the little Republic.

None of the officials appear to have hesitated to take the oath of allegiance in terms to the Constitution of the United States, and yet we are told to-day with much vehemence of oratory that if Congress meant what it said, a crime has been committed which will appall the world.

Leaving aside oratorical exaggeration, we understand the argument to be that while no reservation was made in the provision subjecting the municipal laws of Hawaii to the Constitution, yet Congress cannot have intended this, for the results would be too shocking to think of.

The learned counsel and Attorney-General for Hawaii has very correctly stated one of the rules with regard to the interpretation of agreements "In the interpretation of a contract," he says, "the intention of the parties is the pole star." But this astronomical anology, while quite sound, is subject to another rule of no less importance and no less firmly settled. The Court will look first to the language used, and if that language is plain and unambiguous, it will be controlled in the interpretation by the words which are presumed to represent the thoughts and intentions of the parties.

It is no less true in English than it is in Latin that where there is no ambiguity there is no room for interpretation.

Is there any ambiguity here?

Upon the execution of the cession, upon the seizure of the Islands by the United States, upon the hoisting of

the American flag, the legislation of Hawaii became subject to the will of the new sovereign. Congress might permit it to exist or might abolish it or might adopt a middle course and permit it to continue, provided it coincided with those rules and principles which have been considered necessary to the protection of a free people.

Congress chose not to tear up the municipal legislation of the Hawaiian Islands, but to permit it in a modified sense to continue in existence as a code of laws enforced by the new sovereign.

> "The municipal legislation of the Hawaiian Islands * * * not inconsistent with this general resolution *nor contrary to the Constitution of the United States* * * * shall remain in force until the Congress of the United States shall otherwise determine."

Whatever may be said of the wisdom of this Constitutional provision, which probably seemed wise to all the parties at the time, it does not lack clearness and is not open to the charge of ambiguity.

VIII.

The Insular Decisions and their Bearing on the Case at Bar.

The learned counsel draws a distinction between these and the present case and also draws much apparent comfort therefrom. First, he claims that the cases are very different; second, that the decisions do him no harm; finally, that they give countenance to his theory that the Constitution does not apply. In other words, they are strongly in his favor.

It will readily be conceded that in certain respects the decision of this Court in the Porto Rico cases, applying as it does to a different state of facts from those now presented, leaves room for much drawing of distinctions.

The effect of a mere Treaty, not followed by an Act of Congress, is not involved here since no Treaty calls for examination. What the Treaty may do by its own action, to what extent that action may be conclusive without the interposition of Congress, how far the "'Supreme Law of the land" as established by contract with a foreign power may be displaced, modified or superseded by an Act of Congress,—another supreme law,—may be interesting to consider, and yet unimportant to decide where the cession of foreign territory was made to and accepted by our Government without any Treaty at all. The well-nigh omnipotent power of Congress controls the operation and fixes the terms upon which our Government will accept the surrender of a foreign nationality and take upon itself the new responsibilities, moral, financial and political which the transfer necessarily implies. In fact, it is quite easy to see that the learned counsel is entirely right in his assumption that the Insular decisions present different questions from those which are now before the Court.

But—and therein we do not expect the hearty concurrence of our learned friends—it must be found on

examination that the questions above referred to were the only ones which caused this learned Court so much embarrassment in reaching a satisfactory conclusion and made it impossible for its members to unite in a harmonious declaration of the law.

Here we have no complication arising from the terms of a Treaty, no solicitude about a new population transferred, without its consent, to a new master, no question as to whether such a population must be treated with that humanity which mitigates even the power of Congress. So far does this solicitude extend that one of the learned Justices (182 U. S., p. 282) suggested (without deciding) that there was a stronger power, perhaps, in the unwritten law which would restrain our Federal Legislature should it attempt to deprive the newly adopted members of our household of those inborn, natural privileges which belong to men because they are men, who may claim without a special declaration what nature intended that they should enjoy. In other words, Congress may do much but its powers are limited to *doing good*—they are able to enlarge, not to shackle liberty; to enfranchise, not to enslave; to promote the pursuit of happiness, not to hinder it.

How different all this from the case now before the Court. The nice and delicate questions arising as to the functions of the treaty-making power are eliminated—no suspicion can be entertained of the motives of the Legislature, for it has generously in express terms extended the mantle of the Constitution to the new territory, reserving nothing, withholding nothing—nay, more; it has, if the learned counsel from Hawaii is correct, given the Hawaiians all that they asked for and in the form dictated by themselves.

It was *they* who offered all they had on condition that they should receive the benefits of our Magna Charta. They were unwilling, apparently, to leave Congress any latitude or discretion in its extension of the rights of liberty, and insisted upon the whole Constitution as part of the imme-

diate consideration of the transfer. Nor has the Court in this case to consider how far the subsequent Act of Congress conflicts with the Treaty, to what extent the Act and the Treaty might work harmoniously, how far the status created by the Treaty was modified, to what extent the Treaty made the newcomers citizens, or subjects, or left them aliens. Surely, if all these and other difficulties specially incident to the Porto Rican cases had been eliminated, it is out of the counsel's power, or ours, to say that this Court would have experienced any difficulty in deciding the Insular cases. In other words, if those cases had been very different from what they are, they might have been easily decided.

The difference in legal status between the treaty-acquired Spanish possessions and Congress-annexed Hawaii is stated *in terms* by the eminent and learned Mr. Justice Gray in *Downes* v. *Bidwell*, 182 U. S.:

> "The cases now before the Court do not touch the authority of the United States over the territories in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, *and the Territories of Alaska and Hawaii;* but they relate to *territory in the broader sense, acquired by the United States by war with a foreign State.* * * * " (p. 345).
>
> "The Civil Government of the United States cannot extend immediately, and of its own force, over territory acquired by war (*ibid*). * * * The government and disposition of territory so acquired belong to the Government of the United States, consisting of the President, the Senate elected by the States and the House of Representatives, chosen by and immediately representing the people of the United States" (p. 346).

Owing to the importance of the Insular cases and the relation which the decisions are claimed to have to this

case, we will not apologize for analyzing them in some detail.

The four dissenting Justices in those cases believe, as we understand their opinions, the Constitution to have the same effect whether extended by Congressional statute or not. Consequently it is unnecessary to examine the opinions in detail, since we believe their reasoning to be altogether in favor of sustaining the judgment herein, irrespective of questions as to the precise language of the Act of Annexation, the theory of the minority being that all the provisions in favor of human liberty are equally binding upon Congress in all territory over which our flag waves in sovereign dominion.

On the other hand, because of the somewhat different standpoints from which the questions involved were viewed by the learned Justices who wrote for the majority, it will be necessary to consider separately the opinion of Mr. Justice Brown, who announced the judgment of the Court, and that of Mr. Justice White, with whom concurred Justices Shiras, Gray, and McKenna, for the purpose of ascertaining whether anything contained in either opinion militates against our view, or whether, on the contrary, the underlying philosophy of both is not in entire harmony with our position.

Our treating these cases (Insular cases) in what may seem a somewhat fragmentary manner rather than by formulating a definite set of propositions, is due to the fact set forth in the note of the Reporter (182 U. S., 244 note). "Thus it is seen that there is no opinion in which a majority of the Court concurred."

IX.

Mr. Justice Brown's Opinion.

The theory of this opinion may, we respectfully submit, be embodied in the two following propositions:

I.—The Constitution was made for the States by the States themselves, and has relation to them alone, except that where all power is withheld from Congress by positive prohibitions, the territories incidentally benefit thereby, not because the Constitution applies directly to them, *but because Congress has no jurisdiction over certain specifically prohibited matters.*

II.—*Where the Congress by legislation extends the Constitution, however, it becomes applicable as a Constitution to the very territory itself, that is to say, it is positively, actively and irrevocably in force.*

The second proposition is directly applicable here.

This proposition cannot be reconciled with any idea that the words "nor contrary to the Constitution" contained in the Act annexing the islands, are merely declaratory of rights which would exist in any event without any expression by Congress.

The Territorial Jury Cases, so naturally ignored by counsel for the Government, seem altogether in point and logically decisive of the case at bar. They are cited with approval in the opinion under consideration as sustaining the second of the above propositions.

These cases, Justice Brown holds, decide:

> "That *where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.*" (Downes Case, 182 U. S., 271.)

Now what on the other hand does Mr. Justice Brown say as to territories to which Congress has not extended the Constitution?

> "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all irrespective of time or place and such as are operative only 'throughout the United States' or among the several States."
>
> "Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the compentency of Congress to pass a bill of that description. *Perhaps,* the same remark may apply to the First Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.
>
> "Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States,' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' *by which term we understand the States whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them.*" (Downes Case, 182 U. S., 276-277.)

In these few lines we have the fundamental postulates of Justice Brown's opinion.

The following interesting passage from this opinion has been cited by the learned Solicitor-General as indicating a belief that where the Constitution *is not extended* jury trial might be dispensed with.

> " We suggest without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence, * * * which are peculiar to the Anglo-Saxon jurisprudence, and some of which have already been held by the States to be *unnecessary* to the proper protection of individuals." (Downes Case, 182 U. S., 282-283.)

It should be remarked that Mr. Justice Brown's position in effect admits that all the amendments save perhaps the so-called common law ones (4th, 5th, 6th, 7th) may apply to the government in all territories without any congressional extension. If this be so then is it not obvious that an extension in terms must have some additional effect, since in Utah these same remedial rights (which when subsequently admitted into the Union that State dispensed with) were held inviolate in the Territory because of the extension of the Constitution there by statute.

It is elementary that all the language of a statute must be given effect. To ignore in the very Act of Annexation the words " nor contrary to the Constitution " sets at naught this salutary rule.

As the learned Justice says, speaking of Springville *v.* Thomas (166 U. S., p. 707), which held that the amendment was in force in that territory (Utah):

> " It was held that a verdict returned by less than the whole number of jurors was invalid, because in contravention of the VIIth Amendment to the Constitution and the Act of Congress of April 7, 1874, C. 80, 18 Stat., 27, which provides ' that no

party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.'

"It was also intimated that Congress 'could not impart the power to change the Constitutional rule,' which was obviously true with respect to Utah, since the Organic Act of that territory had expressly extended to it the Constitution and laws of the United States. As we have already held, that provision once made could not be withdrawn. If the Constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such and become of no greater authority than an ordinary act of Congress. In Am. Pub. Co. *v.* Fisher, 166 U. S., 464, a similar law providing for majority verdicts was put upon the express ground above stated, that the Organic Act of Utah extended the Constitution over that territory. These rulings were repeated in Thompson *v.* Utah, 170 U. S., 343, and applied to felonies committed before the territory became a State, *although the State Constitution continued the same provision.*"

Downes Case, 182 U. S., pp. 269-270.

This clearly is authority for the proposition that congressional extension carries with it the so-called common law amendments. If not, then it does nothing, the other amendments being admittedly applicable there (Solicitor-General's Brief on submision, p. 18).

It is quite evident from an examination of the Springville case that it was because it conflicted with the VIIth Amendment (whether operating by its own force or by congressional extension), and not with any mere statute that the territorial act dispensing with unanimity was held invalid.

This Court there said:

"The Supreme Court of the Territory held in Hess *v.* White, 9 Utah, 61 (and the decision was folowed in these cases), that the Act of Congress of September 9, 1850, 9 Stat., 453 C. 51, Sec. 6, the organic act of the Territory vested in the terri-

torial legislature such unlimited legislative power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. But defendants contended that the act of Congress as thus interpreted was in violation of the Seventh Amendment and the validity of the act was in that way drawn in question. In the view which the Supreme Court took of the act it was obliged to subject it to the test of the Constitution, and accordingly in deciding that the Seventh Amendment did not require unanimity of action, the *Court held in effect that the Act of Congress was constitutional, although it empowered the territorial legislature to provide for verdicts by less than the whole number of jurors.*"

" The question involved was not matter of construction of the territorial act, but the court discussed its validity, and this depended *on the validity of the act of Congress giving it the scope which the court attributed to it.*"

"In this there was error. In our opinion the VIIth Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases *and the act of Congress could not impart the power to change the Constitutional rule,* and could not be treated as attempting to do so." (Springville *v.* Thomas, 166 U. S., pp. 708-709.)

Another reason conclusively shows that the application of the VII Amendment to Utah was the question in the case.

The amounts involved being less than the jurisdictional amounts, the case could not have been entertained by this Court, save on the ground that a Constitutional question was involved.

Cases holding that the States may dispense with trial by jury or indictment can have no relevancy to this case. The first eight amendments are admittedly applicable to the Federal Government and its agencies alone. The State Governments are the ultimate protectors of the

liberties of the citizen, and with the exception of the few instances, mainly provided for in the last three amendments (XIII, XIV, XV), the United States Courts cannot interfere.

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Hence we fail to see the relevancy of the citation by counsel of Hurtado *v.* California, 110 U. S., or Maxwell *v.* Dowe, 176 U. S. The following citation demonstrates their utter inapplicability.

In Am. Pub. Co. *v.* Fisher, 166 U. S., 467-468, Judge Brewer, delivering the opinion of the Court, said:

> "Therefore, either the seventh amendment to the Constitution, or these acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by a jury and nullified any act of its Legislature, etc." * * * "*In order to guard against any misapprehension, it may be proper to say that the power of a State to change the rule in respect to unanimity of juries is not before us for consideration.* Walker *v.* Sauvinet, 92 U. S., 90. Hurtado *v.* Cal., 110 U. S., 516."

It has thus been shown that it was not because of inconsistency with Congressional legislation that the Utah law permitting conviction without unanimity was held invalid by this Court because the legislative assembly had full legislative power, and the Territorial Supreme Court had held that Congress intended to impart the power to pass the very Act in question. It was declared invalid because it was "inconsistent with the Constitution and laws of the United States." Revised Statutes U. S. §1851, *vide infra,* p. 48.

Thus as the Supreme Court of the Territory of Utah said:

> "It is apparent that the sole question here is whether the provision for a verdict by three-fourths of the jury in a civil case was a rightful subject of legislation *consistent with the Constitution of*

> *the United States providing that the right to trial by jury shall be preserved.* In other words, do the words "trial by jury" as used in the VIIth Amendment to the Constitution mean a jury which renders its verdict by the unanimous action of its twelve members?" Hess *v.* White, 9 Utah, 67.

On the theory announced by Mr. Justice Brown in the opinion of the Court (Downes case), the case at bar is on all fours with that of Utah.

Extension of the Constitution by Congress thus has some active positive effect; otherwise, in the cases cited by Mr. Justice Brown, if the statutory phrase in the Territorial Act "consistent with the Constitution" were merely declaratory, as counsel for Hawaii here contend the language of the Act of Annexation "nor contrary to the Constitution" to be, all the discussions as to the effect of extension would have been entirely unnecessary. The extension by Congress, to be of any effect, must of necessity secure to the people of the territories rights which in the absence of such affirmative extension might have been denied them. The right involved in the Territorial Jury Cases is the very same right here brought in question—trial by jury.

The application by Congress of the Constitution has the same effect as a specific enactment of a law providing for jury trial, etc., save that the former is irrepealable.

> "In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary *either* to extend the Constitution and laws of the United States over them, *or* to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of *habeas corpus* as well as other *privileges of the bill of rights.*"
>
> 182 U. S., 279.

Thus, we respectfully submit, it has been demonstrated with as much certainty as any proposition resting on authority and precedent can be, that on the theory expounded by Mr. Justice Brown in the opinion of the

Court in Downes *v.* Bidwell the extension of the Constitution to new territory confers upon the inhabitants the right to trial by jury. And manifestly such must in this case have been the intention of Congress, moved by a desire to free Hawaii from all anxiety concerning the much mooted question as to what rights, if any, went into the territories to which Congress had not extended the Constitution.

To assume that Congress used this plain language for the purpose of making confusion worse confounded, is unreasonable and unnecessary.

It is idle to deplore in advance the results which might have followed in the Philippines were jury trial carried there by the Constitution *ex proprio vigore*, because such considerations are wholly alien to the case at bar.

If Congress extended the Constitution to Hawaii and has not done so in the territory acquired by the Treaty of Paris, is it not fair to assume that Congress meant to distinguish between the two? Yet in spite of the language of the Act, the Solicitor-General argues that the Constitution had no more effect in Hawaii than in the Philippines and Porto Rico. The adoption by this court of such a construction could not but stultify the intelligence and paralyze the mandate of the American Congress.

> "The liberality of Congress *in legislating the Constitution into all our contiguous territories* has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression." Downes Case, p. 286.

The next thing to be noted about the position of the Court as stated by Mr. Justice Brown in the extracts given above, is that in all cases where there is no legislative provision extending the Constitution, the result reached by Justices Brown and White is precisely the same, *i. e.*, that in all unincorporated territory the rights

of the inhabitants are safeguarded, if at all, only by reason of the general negative provisions of the Constitution.

On Justice Brown's theory the inhabitants would have protection because of the impotency of Congress in certain respects, *i. e.*, they would have immunities.

While on Justice White's theory these negative provisions of the Constitution apply to them directly because they were intended so to apply and the Constitution was made for all the territory of the United States as well as for the States themselves; in other words, the people everywhere have positive Constitutional rights.

A like result is thus reached by somewhat different chains of reasoning. The divergence of these theories may, perhaps be claimed to lead to different conclusions as to the effect consequent upon extending the Constitution by Act of Congress. If such is not the case, however, as we believe will logically appear, our contention is equally deducible from either opinion.

The opinion of the Court in the Downes Case maintains that the Constitution can be extended *as a Constitution* (*i. e., something above legislative interference and which carries with it certain positive rights, among them trial by jury.*) This extension having taken place by the Act of Annexation, the case cannot be distinguished from the Jury cases in other territories, quoted and approved by all the Justices in the Insular Cases.

It may be well before proceeding to an analysis of the concurring opinion to dispose here of a case cited by our opponents, but which seems to us wholly outside the present question. The references made to it in the opinion under consideration admirably demonstrate its inapplicability. (*In re* Ross, 140 U. S., 453.)

The philosophy of the Ross case is summed up in the sentence quoted below from the opinion in the Downes case, which shows that the Consular Courts in Japan were merely concessions wrung from a foreign state in a foreign land wholly outside of the power of Congress. These tribunals were a substitute for Japanese courts which might otherwise have tried

American citizens as they saw fit. The Japanese system did not at that time commend itself to our ideas of the trial and punishment of crime. Had the Hawaiian law provided for trial by walking on red-hot irons and punishment by disemboweling, will it be questioned that our courts could and would by virtue of the Newlands Resolutions have declared it unconstitutional? But Japan might well have done so and the only remedy, should our citizens have suffered, would have been *war* or diplomacy, certainly not *habeas corpus. The vital difference is that the Consular Courts were acting wholly by permission of Japan, the Hawaiian courts were acting wholly by permission of the United States Congress.*

> "The guarantees it (the Constitution) affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, *and not to residents and temporary sojourners abroad.*" Quoted by Mr. Justice Brown in Downes Case, 269.

As Justice Brown said speaking of the Ross case and the rule there established that

> "the Constitution does not apply *to foreign countries* or to trials therein conducted, and that Congress may lawfully provide for such trials before Consular tribunals, without the intervention of a grand or petit jury." Downes Case, 270.

This would seem to demonstrate the futility of here invoking the Ross case as in any way pertinent.

It now remains to be seen what effect extension of the Constitution by Congress has in the light of the theory of the concurring opinion delivered by Mr. Justice White and assented to by Justices Shiras, McKenna and Gray.

X.

The Theory of the Concurring Opinion.

The theory of that opinion assumes as a basis that the Constitution is all-pervading and everywhere applicable to Governmental action, the sole question being as to what provisions apply to territory in various stages of assimilation (or non-assimilation) by the Nation. Therefore the inquiry is not whether the Constitution has been extended, but whether territory is incorporated into the United States; not whether certain provisions apply because Congress extended the Constitution, but whether Congress has so acted as to place the territory in a position where those provisions of the Constitution must apply.

> "Every function of the Government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable." (Downes Case, p. 289.) * * *
>
> "From these conceded propositions, it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and *subject to its applicable limitations*, and that every provision of the Constitution which applied to a country situated as was that island, was potential in Porto Rico.
>
> "And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relation to the United States." *Id.*, 293. * * *
>
> "Albeit, as a general rule, the *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject that such an inquiry is

necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions, to do particular acts. In the nature of things limitations of this character cannot under any circumstances be transcended, because of the complete absence of power."

"The distinction which exists between the two characters of restrictions, those which regulate a granted power and those which withdraw all authority on a particular subject, has in effect been always conceded even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories and was not operative in such districts of country." (*Id.*, 294, 295.)

This quotation states substantially Mr. Justice White's position.

We must infer from his treatment of the Utah cases that he deems jury trial not to be in constitutional force until territory becomes incorporated (182 U. S., 293).

If this be the case the inquiry which must be answered on Mr. Justice White's theory is as to whether the Newlands Act incorporated Hawaii. If it did, then Mankichi is entitled to trial by jury.

Since Mr. Justice White has not indicated any special provisions save the general negations in the Amendments, applicable to unincorporated territory, we are brought to the result before indicated while analyzing Mr. Justice Brown's proposition that so far as such territories and the constitutional rights of their inhabitants are concerned, the determination reached by both judges in this particular, is the same.

Thus the only case in which the common conclusions reached by different trains of reasoning may perhaps eventuate in different results is in the case of the "extension" by Congress of the Constitution. But while the

extension in Mr. Justice Brown's theory confers constitutional rights directly and incorporation has the like effect in Justice White's theory, *nevertheless,* in the latter's theory *extension is evidence of incorporation,* and hence by proving or indicating the intention of Congress to incorporate territory may, by indirection, give rise to the same results as follow from the fact of extension.

Thus if extension were *conclusive evidence* of the intention of Congress to bring about incorporation, we would reduce the apparent conflict between the eminent jurists to a logomachy or mere word battle.

Justices Brown and White agree:

(1). That all general Constitutional prohibitions were in force in Hawaii as soon as annexed.

(2). Mr. Justice Brown maintains that if the Constitution was extended by Congress, it would invalidate trials other than by common law juries.

(3). Mr. Justice White indicates that Hawaii must be incorporated in order that its inhabitants may have that right, arguing that "incorporation" is a question of the intention of Congress and intimating that "extension" is evidentiary, at least to some extent, of that intention.

Downes Case, p. 293.

If in the case of Hawaii the phrase "nor contrary to the constitution," is sufficient evidence of extension, the decision below must be sustained, both on Mr. Justice Brown's theory and on Mr. Justice White's—to wit, extension of the Constitution, either directly or through creating the *status incorporation,* made applicable to Hawaii the Fifth and Sixth Amendments and hence the trial of Mankichi was contrary to the Constitution and the writ was properly sustained.

It must be first noted that the learned Mr. Justice White makes a distinction between a Treaty and an act of Congress as to the incorporation of territory. He says (Downes Case, 319):

> "When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the *treaty-making power* was always deemed to be devoid of authority to incorporate territory into the United States *without the assent, express or implied, of Congress,* and that no question to the contrary has ever been even mooted."

It is perhaps because mindful of this distinction that counsel for Hawaii insist upon speaking of the Joint Resolution of Congress annexing the islands as a Treaty. In view of the fact that the constitutional characteristic of a Treaty is that the House of Representatives has no part in its making, which is precisely why Mr. Justice White thinks a Treaty cannot incorporate new territory, it cannot add anything to Hawaii's case to call a Joint Resolution a Treaty, as we have heretofore demonstrated at considerable length out of deference to the argument of the eminent counsel. By whatever name called, it was and always will be the action of the Congress of the United States, and not of the treaty-making power.

The Joint Resolution admitting Texas had it had only the force of a treaty could not have conferred Statehood upon that country (see Downes Case, p. 336).

Therefore, in this case the first requisite for incorporation is present (according to Justice White's theory), viz., Congressional action. Congress certainly not only assented to the transfer, *but itself directly annexed and forthwith applied the Constitution as the test of all existing municipal law.*

The preliminary requisite to incorporation thus exists, and the remaining inquiry is as to the effect of the language of the Act of Annexation itself as evidence of an intention to incorporate.

In substance it is the same as that applied to the territories generally in limiting their legislative authority, *vide supra,* and taken alone should settle the question.

The Government will have to show from other clauses in the Newlands Resolution that the language does not

mean in this case exactly what its equivalent means in the Revised Statutes. *Vide infra,* 48.

The sole clause upon which the Government can rely to maintain its contention that the Act of July, 1898, did not incorporate the islands is that maintaining the eixsting custom duties. They may lean upon Justice White's remark as to the Florida Treaty (Downes' Case, p. 334).

> "This Treaty also, it is to be remarked, contained discriminatory commercial provisions incompatible with the conception of immediate incorporation arising from the Treaty," etc.

The principle as to treaties, says Justice White, is (Downes' Case, p. 336):

> "That the condition of a Treaty, *when expressly or implicitly ratified by Congress,* becomes the measure by which the rights arising from the Treaty are to be adjusted."

The Treaty promises and the sanction of Congress executes its promise.

But Congress has also power to incorporate directly:

> "Take for instance the simultaneous acquisition and admission of Texas, which was admitted into the Union as a State by joint resolution of Congress instead of by Treaty. To what grant of power under the Constitution can this action be referred, unless it be admitted that Congress is vested with the right to determine when incorporation arises? It cannot be traced to the authority conferred on Congress to admit new States, for to adopt that theory would be to presuppose that this power gave the prerogative of conferring statehood on wholly foreign territory. But this I have incidentally shown is a mistaken conception. Hence *it must be that the action of Congress at one and the same time fulfilled the function of incorporation and this being so the privilege of statehood was added.*" **(p. 336.)**

Congress cannot, as we understand the foregoing, "confer statehood on foreign territory," but if it attempts to do so it will be assumed that it first incorporated and having by incorporation conferred upon itself the power of admission, it "incidentally" admits a new State.

Examination of Mr. Justice White's opinion fails to disclose any criterion by which to judge of what constitutes "incorporation as a territory."

As far as can be gathered from the Louisiana episode as discussed by him it consisted in action by Congress placing the new territory on somewhat the same footing with the Northwest Territory. This criterion must, however, fail because the Ordinance of 1787 was largely composed of grants of governmental powers and rights, while, as Justice White says of the District of Columbia, admittedly a part of the United States:

> "At the present time the people of the district live under a local government totally devoid of local representation," etc. (p. 290).

Hence that portion of the Ordinance conferring political rights is not necessary to incorporation.

Nor was the anti-slavery clause of that famous instrument made applicable to much of the Territory afterwards incorporated.

What then is necessary to incorporation?

The sole question here being whether the other clauses of the Joint Resolution prevented the Constitutional clause from having the full effect contended for, and the only other clause which could be invoked to prove that Hawaii remained unincorporated (with one exception to be hereafter noted) being the customs clause, we have narrowed the inquiry down to this one point:

May a territory be incorporated and yet have a commercial system at variance with the uniformity clause?

An answer to this question seems to solve this case, as far as the views expressed by the concurring Justices in the Insular Cases are concerned.

The following quotation from Justice White's opinion

would indicate that such a customs arrangement is consistent with incorporation. Note especially the following (p. 331):

> "For the purposes of government, the District of Louisiana was attached to the territory of Indiana which had been carved out of the Northwest Territory. Although the area described as Orleans Territory was thus under the authority of a territorial government, and many laws of the United States had been extended by act of Congress to it, it was manifest that Mr. Jefferson thought that the requirement of the treaty that it should be incorporated into the United States had not been complied with." * * *
>
> "At the following session of Congress on March 2, 1805, 2 Stat., 322, c. 23, an act was approved, which, among other purposes, doubtless was intended to fulfill the hope expressed by Mr. Jefferson in the letter just quoted. That act, in the first section, provided that the inhabitants of the Territory of Orleans '*shall be entitled to and enjoy all* the rights, privileges and advantages secured by the said ordinance,' (that is, the ordinance of 1787), 'and now enjoyed by the people of the Mississippi Territory.' As will be remembered, the ordinance of 1787 had been extended to that territory. 1 Stat., 550, c. 28. Thus, strictly in accord with the thought embodied in the amendments contemplated by Mr. Jefferson, citizenship was conferred, and the Territory of Orleans was incorporated into the United States to fulfill the requirements of the treaty, by placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed. It is pertinent to recall that the treaty contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects, and that even after the action of Congress above stated, this

> condition of the treaty continued to be enforced, thus demonstrating *that even after the incorporation of the territory,* the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect *being that incorporation as to such matter was for the time being in abeyance.*"
>
> Downes *v.* Bidwell, 182 U. S., p. 332.

It thus appears that a separate Customs system, inconsistent with uniformity, is entirely compatible with incorporation. Hence any argument derived from the Customs clause in the Joint Resolution cannot avail to support the contentions of Hawaii. The counsel for the Territory must seek reliance upon some other provision of the Joint Resolution if they would avoid the plain inference that Congress intended to incorporate Hawaii and did so by applying the Constitution to those islands.

The learned Solicitor-General has discovered another clause in the Newlands Act upon which to base his fundamental proposition that Congress meant nothing when it used the phrase "nor contrary to the Constitution."

After quoting the language of Mr. Justice White in Downes *v.* Bidwell:

> "By joint resolution of Congress the Hawaiian Islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the Government of Hawaii appeared, by which the Hawaiian Islands were given the status of an incorporated territory."

He goes on to say (Brief on Submission, p. 11):

> "In this connection, it may be well to point out that the provision that 'no Chinese shall be allowed to enter the United States from the Hawaiian Islands,' *is totally inconsistent with the theory that Congress intended by the resolution to incor-*

porate the islands as an integral part of the United States, or extend the Constitution over them."

The soundness of this theory is easily tested by a reference to the so-called Organic Act, April 30, 1900, which is claimed to have so thoroughly incorporated the islands. If the same provision is found there, it would indicate that this Act equally with the Newlands Resolution "is totally inconsistent" with incorporation, and our distinguished opponents must elect to abandon Hawaii to the limbo of unincorporated territories, or to radically remodel their theory as to incorporation and extension. An examination of that Act (April 30, 1900,) actually discloses the following provision:

> Sec. 101. after giving resident Chinamen one year within which to get a certificate provides *" that no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Territory or District of the United States from the Hawaiian Islands."*

It thus appears that even by the terms of the so-called Organic Act, which is admitted by our learned opponents to have incorporated Hawaii into the United States, Chinese residents of the Islands were cut off from access to the other portions of the United States, a right heretofore accorded to all men in our broad domain. Very essential rights may thus be withheld without, in the view of our eminent opponents, affecting the fact of incorporation.

If Hawaii was not incorporated by the Act of July 7, 1898 (Joint Resolution), it is still unincorporated, because to-day it has not all the rights of the people of other Territories of the United States.

Therefore, the same objection urged so vehemently against the effect of the Newlands Act applies with equal force to the so-called Organic Act.

The Newlands Act gave to the Islands a government and system of laws. The later Act simply detailed and modified the machinery of government, maintaining with a few additional exceptions the same legis-

lation, but every legal, governmental, or judicial act was as much dependent upon the sovereignty of the United States after the transfer of sovereignty under the Newlands Resolution as subsequent to the Act of 1900.

> "In the exercise of the power thus conferred "upon him by the joint resolution *the President* "*hereby directs* that the civil, Judicial and mili- "tary powers in question shall be exercised by the "officers of the Republic of Hawaii as it *existed* "just prior to the transfer of sovereignty, *subject* "*to his power to remove such officers and to fill* "*vacancies.*" Address of Minister Sewall, Solicitor General's Brief on Submission, p. 40.

The Act of Annexation provided for Hawaii a code of laws which were to operate in conformity with the Constitution. The fact that it expressly maintained Hawaiian law is of no more significance than if it had extended the laws of Oregon to Hawaii. *There was in Hawaii a complete and adequate legal system, operating by virtue of the action of Congress and the sanction of the United States.*

In two respects only did the inhabitants have under the Newlands Act fewer civil rights than those in other admittedly incorporated territory of the United States. Special duties and restriction on Chinese emigration existed in Hawaii. The first of these, as we have seen in examining Mr. Justice White's opinion, has been declared compatible with incorporation; the second has been retained in the Act which Counsel for Hawaii admit fully incorporated the Islands.

We venture to suggest that much difficulty is cleared away by defining somewhat more precisely than has been done heretofore the meaning of incorporation.

Incorporated territory, as we understand the doctrine of the concurring opinion in Downes *v.* Bidwell, is territory out of which Congress has power, under the Constitution, to carve new states.

Incorporation, according to the advocates of that

theory, is not brought about by mere treaty annexation; otherwise many alien and altogether unassimilable peoples might be brought in to form part of the United States—that land composed of states actual and in embryo, the latter called territories, out of which Congress may engender new states at will, as it did out of the Northwest Territory.

The test then of incorporation seems to be whether Congress has taken some action in regard thereto, manifesting an intention that such territory should be accorded all the privileges conferred by the Constitution upon territory awaiting statehood, and which Congress may without further action admit as an adult member of the Union.

The political philosophy of the adherents of the incorporation doctrine thus becomes clear. Congress alone can judge what peoples are by race, national character and institutions fitted to become an integral part of the United States forever as distinguished from inhabitants of merely appurtenant territory which may have been incidentally, accidentally or temporarily acquired.

Any action on part of Congress manifesting such intention incorporates. (Downes *v.* Bidwell concurring opinion *passim*).

What action then more conclusive than an extension of the Constitution? Such extension confers all constitutional rights which any peoples under United States sovereignty not yet actually admitted to statehood can have and virtually declares the belief of Congress that the new peoples are assimilable.

Thus viewed, the "incorporation theory" seems to be another phase or expression of the "extension theory." On either theory an extension of the Constitution by Congress confers new rights upon the inhabitants, and brings them within the operation of additional clauses of the Constitution. When Congress expressly extends the Constitution it impliedly incorporates, and when it incorporates in any other way (as in extending provisions of Northwest Ordinance or of other laws, etc.) it impliedly extends the Constitution.

The advocates of either theory thus unite in the fundamental premise that, by virtue of Congressional action applying the Constitution to newly acquired territory, people under the jurisdiction of the United States may be endowed with Constitutional rights which they would not possess by virtue of the Constitution alone and unaccompanied by such legislation.

The Act of July 7, 1898—Newlands Resolution—has met the requirements of both schools, and we respectfully submit that the reasoning of the insular opinions (majority and minority) support our contention.

It may be well in concluding on this point, to note the suggestion of the Solicitor-General that the words of the act do not extend the Constitution, and indicating his belief that incorporation and extension are concomitants.

He says (Brief, p. 17):

> "The words ('nor contrary to the Constitution') had a meaning and the meaning is plain (*i. e.*, he argues that they mean nothing). *They were not employed to extend the Constitution. Before the islands could be incorporated and the Constitution, with all its limitations, extended it was necessary that a new government should be framed and an organic act passed.*"

This would indicate that the Solicitor considered extension and incorporation as cause and effect.

Certainly the language of the Act of Annexation is quite as strong as that heretofore employed by Congress in applying the Constitution as a touchstone for testing the validity of Territorial Laws. The Revised Statutes in the chapter "Provisions common to all territories," provide:

> §1851: "The legislative power of every territory shall extend to all rightful subjects of legislation *not inconsistent with the Constitution and laws of the United States.*"

The Act of April 30, 1900, also continuing in force the Municipal law of Hawaii provides:

> §6. "That the laws of Hawaii *not inconsistent with the Constitution* or laws of the United States or the provisions of this Act shall continue in force."
>
> §5. "That the Constitution and except as herein otherwise provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States—provided that * * * (Chinese laws)—shall not apply."

This language is the absolute equivalent of that of the Joint Resolution, "nor contrary to the Constitution." Yet we are told that the former extended the Constitution while the latter did not. If this be true the word "inconsistent" must have some occult meaning which the human mind has not heretofore grasped. We have searched in vain for a key to the mystery, which seems more unintelligible than the alleged Baconian cipher for which the immortal lines of the alleged Shakespeare are said to have served as a mere foil.

XI.

Conditions in Hawaii Make Evident the Intention of Congress.

The situation of Hawaii was such that Congress evidently intended to incorporate the islands into the United States.

The intention of Congress becomes quite evident when we consider the existing situation in that country and contrast it with that in the territories ceded by Spain. Hawaii had been for over half a century governed in fact, if not in name, by institutions entirely similar to our own.

Its system of jurisprudence was that of the common law. The law provides (§1109, Civil Laws):

> "The common law of England as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases except as otherwise expressly provided by the Hawaiian Constitution or laws," etc.

Its judicial system and civil laws are all built on a common law foundation. The Constitution is framed on the model of our own, except that the substance of the first ten amendments of the United States Constitution is placed in the first article of the Hawaiian Constitution.

Article I, Section 3, provides:

> "Subject to such changes as the legislature may from time to time make in the number of jurors for the trial of any case, and concerning the number required to agree to a verdict and the manner in which the jury may be selected, etc., the right of trial by jury shall remain inviolable, except in action for debt or assumpsit in which the amount claimed does not exceed one hundred dollars, and such offenses less than felonious as may be designated by law. And provided that no capital case shall be tried by a jury of less than twelve men."

Freedom of speech and of the press, habeas corpus, previous conviction privilege of accused, right of assembly, freedom from quartering soldiers, etc., are guaranteed in language almost identical with that of our own Constitution.

Under these circumstances the alarm manifested by the eminent Attorney-General of Hawaii at the thought of having the American Constitutional system of trial enforced in the islands causes us some surprise. As a matter of fact, unanimous verdict in capital cases was required by the law of 1842 and this remained the rule down to 1847, when the present law allowing conviction upon agreement by nine jurors was passed.

> Republic of Hawaii *v.* Edwards, 11 Haw., 571.

Thus the only innovation introduced by the application of the Constitution is that of the Grand Jury, and in a system based upon the common law, the difficulties of putting such a system into immediate operation are wholly imaginary as will appear from the cases cited hereinafter.

An argument *ab inconvenienti* is supposed to be afforded by the assumed *legal impracticability* of making the criminal procedure in Hawaii during this period conform to the requirements of the Fifth Amendment as to action by a "Grand Jury," in view of the fact that *no provision had been made by statute* for the empanelling and utilization of grand juries in that procedure.

In point of fact, however, it was *not* legally impracticable to organize and utilize grand juries in Hawaii during the period between the 7th day of July, 1898, the date of the signing of the Joint Resolution, and the 14th day of June, 1900, the date the Organic Act went into effect.

By making the Fifth Amendment applicable to and operative in Hawaii, the Joint Resolution itself *ipso facto* authorized and made legally practicable there whatever procedure is practically involved in the organizing of the grand jury, whose intervention the Fifth Amendment *makes an absolutely indispensable*

condition of the exercise of that criminal jurisdiction in cases of "capital or otherwise infamous crime," which the Joint Resolution unquestionably vested in the Hawaiian courts adopted from the old regime, by its express provision that

> "the municipal legislation of the Hawaiian Islands not enacted for the fulfillment of . . . treaties . . . extinguished and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

There can be no question that, as legislation by the new sovereign, this provision was in legal force and effect, the precise equivalent of an act of Congress explicitly *duplicating in literal detail* the criminal statutes of the Hawaiian Islands, as *amended* by the Constitutional provisions requiring a presentment or indictment of a grand jury in every prosecution for a capital or otherwise infamous crime.

The quoted clause of the Joint Resolution, read in connection with the Hawaiian "legislation" and American "constitution" which said clause refers to, adopts, and by necessary implication makes a part of itself, expresses, with absolute certainty and distinctness, the will and intention of Congress that the provisionally continued Hawaiian courts shall exercise the specified punitive jurisdiction over persons accused of capital and otherwise infamous crimes, and that the prosecution of such persons, on such accusations shall begin with a presentment or indictment of a grand jury. The legislative intention being thus clear, the program which it ordains is fully authorized and provided for.

That *Certum est quód certum reddi potest,* is, as, Broom says in his famous work on Legal Maxims, a maxim

> "Which sets forth a rule of logic (i. e., reason) as well as of law, and which is peculiarly applicable in construing a written instrument. A grant

shall be void if it be totally uncertain; but if the King's grant refers to another thing which is certain, it is sufficient; as, if he grant to a city all liberties which London has, without saying what liberties London has (Com. Dig. Grant, E. 14, S. 5; Finch, Law 49). And where the law requires a particular thing to be done, but does not limit any period within which it must be done, the act required must be done within a reasonable time; and a reasonable time is capable of being ascertained by evidence and, when ascertained, is as fixed and certain as if specified by Act of Parliament (per Lord Ellenborough, C. J., Palmer *v.* Moxon, 2 M. & S., 50; 28 E. C. L. R.).

Broom's Legal Maxims, 7th Am. Ed., p. 625.

Applying this principle, all the details *discoverable* by reference to the legislation and the constitution mentioned in the quoted clause of the joint resolution, are both in logic and in law to be deemed *enacted* by Congress precisely as if every syllable of those details had been actually and explicitly spelled out in the literal text of the resolution itself. Congress is not bound to refrain from this word-saving method of legislation by *reference;* and when, as in this instance, it has wisely indulged in it, every detail which is ascertainable by aid of the texts referred to, is as clearly and effectually enacted, then and there, as is any provision whose details are completely expressed in the text making the references.

In legal effect, accordingly, the Act of Annexation does certainly enact, both that the Hawaiian courts shall on occasion entertain prosecutions for capital and otherwise infamous crime, and, that no such prosecution shall be had unless on a presentment or indictment of a grand jury.

The *net result,* so to speak, of this legislation, is obviously this: that the courts shall, when necessary, empanel grand juries of the sort referred to by the provision in question—*i. e.,* the grand juries which the framers were familiar with under the common law sys-

tem derived from England,—and proceed with *such* prosecutions for capital or otherwise infamous crime, as such grand juries, so empaneled, shall have duly initiated by a presentment or indictment.

The use of these terms, grand jury, and presentment or indictment, in the Constitutional provision which the Joint Resolution incorporates into itself by adoption, carries with it all the essential details implied by the words in question in the legal system with reference to which the Constitution speaks. Whatever, therefore, of practice or regulation, is essential to the actual existence and functioning of the sort of grand jury made indispensable by the Fifth Amendment (and, therefore, by the Joint Resolution of which that Amendment is a part), is by necessary implication fully authorized and made legally practicable, by the enactment of such Joint Resolution itself.

This very proposition, that the requirement of the Constitution that prosecutions of this sort must be initiated by the presentment or indictment of a grand jury, by necessary implication gives to the courts invested with the jurisdiction to entertain such prosecutions, all powers and authority necessary for the organizing and utilizing of the grand jury,—this very proposition has been explicitly held and enforced by no less eminent an authority than Chief Justice Marshall, in the opinion quoted below; and the principle has been applied, to this very Hawaiian situation, by the Supreme Court of those Islands, in the opinion which is also quoted below.

In the case of the United States *v.* Hill (1 Brock., 156, 159), cited by this court in the Wilson and Clawson cases (114 U. S., 425 and 487), Chief Justice Marshall said:

> "It has been justly observed, that *no act of Congress directs grand juries, or defines their powers. By what authority, then, are they* SUMMONED, *and whence do they derive their powers?* The answer is that the laws of the United States *have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to*

exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication."

As the Supreme Court of Hawaii has said recently in passing upon this very point:

"Does this construction of the law mean, as has been so earnestly contended, that criminals should, of necessity, go unpunished, and that there was no protection to life and property on the Hawaiian Islands between the 7th day of July, 1898, the date of signing the Joint Resolution, and the 14th day of June, 1900, the date the Organic Act went into effect? Certainly not. During all of this period there was organized Government here; there were officers and courts, legally constituted, continued in office and existence by the order of President McKinley, under the authority given in the Joint Resolution. There was the great body of the municipal laws of the late republic 'not inconsistent with the resolution nor contrary to the constitution of the United States,' continued in force until Congress should otherwise direct. There was provision for a trial of twelve, and that part of the statute authorizing nine jurors to return a verdict could have been controlled by a simple direction, or instruction of the trial court, that there must be a unanimous verdict to convict and those additional safeguards to the life, liberty and property of the citizen prescribed by the Constitution of the United States were here in full force and vigor."

"Among the municipal laws of the Republic of Hawaii continued in force was Sec. 1109 of the Civil Laws, which provide that the common law of England, as ascertained by English and American decisions, is declared to be the common law of the Hawaiian Islands, except when changed by decisions, usage or law. The Circuit Court of the First Circuit was a Court of Record and of common

law jurisdiction, and on August 16th, 1898, had the undoubted power to issue an open venire and summons and empanel a grand jury in the manner provided by the rules of the common law."

"As Justice Cooley said: 'They assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation' (Weimer *v.* Banbury, Mich., 214)."

"Chief Justice Marshall, speaking of the authority of Courts to issue an open venire in the absence of any statute authorizing it and of the law at that time said, 'It has been justly observed that no act of Congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers?'

'The answer is, that the laws of the United States have erected Courts which are vested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indisputable implication.'

'But how far is this implication necessary and indisputable? The answer is obvious. Its necessity is co-extensive with the jurisdiction to which it is essential.' (United States *v.* Hill, 1 Brock., 159. See *ex parte* Wilson, 114 U. S., 425)."

"In *Clawson* v. *United States,* 114 U. S., 486, in approving the action of the Supreme Court of Utah, whose opinion sustained the action of a District Court of the territory in issuing an open venire for jurors, and who based its judgment not on any statute authorizing it, but the fact that such 'power was inherent in the Court, and was not forbidden by any statute in force in Utah,' said, 'We concur in this view, so far as the resort to open venire, after the exhaustion of the two hundred names, is concerned.'"

"The following authorities also support this proposition: 1 Chitty, Crim. Law., 518; 2 Hale, P. C., 265; Mackay *v.* People, 2 Cal., 13; Wilburn *v.* State, 21 Ark., 198, 201; Goodwin *v.* United States, 54 Pac., 432."

Ex parte Edwards, 13 Haw., 47.

Without further elaboration on this point, it is respectfully submitted that Congress knew that it was annexing a little America to the greater; that it was neither remarkable nor unnatural that the Constitution and its system of justice should have been put in force there. Hawaii was in as receptive a condition for Magna Carta rights as Utah in the past, or as Arizona and New Mexico to-day.

If it be sound theory that the surface of the earth is divided into territory "incorporated" into the United States and that which lies in the outer darkness, then it is quite evident that Congress, whatever its views as to Porto Rico or the Philippines, intended by the Joint Resolution to take Hawaii immediately out of the latter category.

It was never intended that the islands should be left in doubt or anxiety on that point.

XII.

The Natural Law Doctrine.

The proposition (relied upon by the Solicitor-General) that the language of the Joint Resolution does not affect the legal situation and leaves it just where it would have been had Congress been silent on the subject of the Constitution, is fallacious both in its premises and conclusion. The plain intention of the Newlands Act was to give to Hawaii every benefit which could be enjoyed by any territory under the sovereignty of the United States save that already enjoying actual Statehood.

Assuming, however, for the argument, that the words "nor contrary to the Constitution" are to be construed by this Court as a mere rhetorical flourish—*vox sed praeter nihil*—a mere *bonne bouche* for use in debate, nevertheless there is no such distinction between natural and artificial or remedial rights in the Constitution as contended for. The positive prohibitions against certain actions on the part of the Government of the United States are equally imperative whatever view the Court may take of the relative importance of the various provisions in question.

The prohibitions against the establishment of a religion, the infliction of cruel or unusual punishment, the taking of property without due process of law, and trying without a jury are equally plain and imperative. They must be given equally positive force. To justify an overriding of the plain language of the amendments by an appeal to the philosophy of natural rights is altogether inadmissible. The obvious mandate of the Constitution cannot be disregarded by invoking the shibboleths of a metaphysical system long since proven utterly without foundation and now hopelessly discredited. The right to trial by jury cannot be suppressed by invoking the shade of Rousseau.

We are extremely reluctant to follow the learned Solicitor-General into a discussion of the vague philosophic doctrine of natural law. We would be carried

far beyond the bounds of this case and embark upon a vast field with little hope of reaching any tangible results, nor do we believe it pertinent to the case in view of the language of the Act itself. It is only, therefore, for the purpose of indicating what seems to us an answer to the learned Solicitor's main proposition, that the Constitution, of its own force, without extension by Congress, carries with it to all peoples under United States sovereignty certain natural rights, as distinguished from artificial rights that we touch at all upon this speculative question.

The learned Solicitor-General, in arguing that the words of the Act of Annexation (Newlands Resolution) "nor contrary to the Constitution" are merely declaratory of a legal situation which would exist in their absence and which is totally unaffected by them, remarks:

> "These qualifying words were inserted in recognition of the fact that there are certain fundamental rights which the Constitution protects wherever the sovereignty of the United States extends. * * * But the right to be indicted by a grand jury and tried by a petit jury does not come within this category. The distinction between natural or fundamental rights, and artificial or remedial rights under the Constitution, is pointed out by Mr. Justice Brown in the opinion in the Downes Case, 182 U. S., 282."
>
> "We suggest, without intending to decide, that there may be a distinction between *certain natural rights enforced in the Constitution by prohibitions against interference with them and what may be termed artificial or remedial rights* which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property, to freedom of speech and of the press, to free access to courts of justice; to due process of law; and to an equal pro-

> tection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government; of the latter class, are the rights to citizenship, to suffrage (Minor *v.* Happersett, 21 Wallace, 162), and to the particular methods of procedure pointed out in the Constitution which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals."

This passage when analyzed must be based upon one of two alternative theories.

(1) Either the natural rights spoken of by the learned Justice exist of themselves and wholly apart from the Constitution, deriving their sanction from a supposed law of nature and not from that instrument.

(2) Or the language of the Constitution itself protecting those rights is so broad and imperative as to be of universal application to governmental action in the specified cases.

If the former be the proper interpretation of this interesting passage, the questions which would arise in regard to it would not present problems of constitutional law at all, but questions of abstract philosophy. If there are certain rights which are protected because they are assumed to belong to the category of "natural rights," the question in each case would be as to whether such rights were "natural" or not. If they were they would be protected because of their inherent character, and if they were not, they would either have to rely upon positive man-made law for their sanction, or else be unprotected by any law.

In order, therefore, to ascertain what rights were natural and, therefore, entitled to immunity from attack by all the organs of the government, we would have to refer not to the law books, which deal only with positive law, but to treatises on philosophy from Aristotles' Politics (250, B. C.) down to Ritchie's "Natural

Rights' (1890, A. D.), with especial reference to Rousseau.

As almost every writer upon the subject has differed as to what natural rights actually are, following in his views the general ideals of the particular time in which he happened to live, we must respectfully submit that any appeal to natural rights at this day must prove utterly futile.

Ritchie on Natural Rights.

Nor do we at all believe that the learned Justice meant that certain rights were to be protected independently of constitutional and positive law simply because they were "natural." We incline to think the true meaning of the passage cited by the learned Solicitor-General to be that the positive prohibitions against all action upon the part of Congress in certain cases were intended for the protection of what were deemed natural rights, and that, consequently, some at least of that vague body of philosophic doctrine has been transplanted into the domain of positive law and given the dignity of constitutional adoption by being placed in the first eight amendments to the Constitution. Therefore, we submit, Mr. Justice Brown must refer to the same rights which he mentions in the following pasage:

> "To sustain the judgment in the case under consideration, it by no means, becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between *such prohibitions as go to the very root of the power of Congress to act at all*, irrespective of time or place, and such as are operative only throughout the United States or among the several States" (Downes Case, pp. 276-277).

This seems likewise to be the thought of Mr. Justice White, for he says in the following passage:

> "Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and

property of the citizen which are not mere regulations *as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts.*" (Downes Case, 182 U. S., page 294.)

Both of the learned Justices, therefore, appear to concur in the view that the positive prohibitions which go to the root of the power of Congress to perform certain acts are operative in all territory, and that such prohibitions may, perhaps, be distinguished from those other prohibitions which refer to remedial or common law rights.

The distinction made then is founded not upon a difference in the nature of the rights themselves, that is to say, as to whether they are natural or artificial, but upon the language of the prohibitions directed against the action of Congress.

This being established, let us examine the suggested distinction with a view of ascertaining its soundness, and whether any line of demarcation can be drawn between the absolute withdrawals of power from Congress and "the form and manner in which a conceded power may be exercised."

Mr. Justice Brown speaks of the right to due process of law and to immunity from unreasonable searches and seizures, as well as from cruel and unusual punishments, coupling them with freedom of conscience, freedom of the press, etc. Congress has the power to take property, to institute searches, to make seizures and to execute punishments. It is evident, therefore, that in no one of these instances does the prohibition go to the root of the power of Congress to perform the acts in question. It may authorize all these things, but when the Government takes property, it must do so by due process of law; when it institutes searches, they must be reasonable (that is to say, according to the canons of the common law), and when it visits punishments, they must be neither cruel nor unusual, as those words are understood in the

light of English and American common law and civilization.

It thus appears that in the seven illustrations given by the learned Justice of rights with which Congress may in no event interfere, three are protected by the prohibitions which do not "go to the root of the power of Congress" at all. Nor is it possible to claim that the instances mentioned belong to the shadowy domain of natural or fundamental rights rather than to the more strictly defined and easily ascertainable category of common law rights. The Fifth Amendment which is one of the clauses of the Constitution invoked in this case, contains a number of prohibitions directed against the action of Congress, all of which are admittedly based upon so-called common law rights rather than upon more general rights or rights not so wholly identified with the development and history of the English law.

If, therefore, for either of the reasons suggested there exist a distinction in the Constitution between the prohibitions in favor of natural rights and those in favor of artificial r ights, consistency necessarily dictates that all the artificial rights may equally be denied by Congress to the inhabitants of new territory to which the Constitution has not been either expressly extended or which has not been incorporated into the United States. Taking, therefore, these rights *seriatim*, our opponent must admit that if the language

1. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury"

is compatible with a trial on information in Hawaii, then it must also be admitted that

2. "any person (in such territory may) be subject for the same offence, to be twice put in jeopardy of life or limb"

or may be.

3. "compelled in any criminal case to be a witness against himself"

or may

4. "be deprived of life, liberty or property WITHOUT DUE PROCESS OF LAW"
and private property may be

5. "Taken for public use without just conpensation."

The Sixth amendment like the Fifth is devoted to consecrating the peculiar forms and procedure long deemed necessary to the maintenance of English liberty, and if jury trial belongs to the category of the artificial or remedial rights these rights likewise belong to the same category, and the court, if they adopt the view of our learned opponents, must hold that the laws of Hawaii, without violation of the Constitution, might have deprived persons in criminal prosecutions from enjoying

(1) "the right to a speedy and public trial;"

(2) "to be informed of the nature and cause of the accusation,

(3) to be confronted with the witnesses against him,

(4) to have compulsory process for obtaining witnesses in his favor,

(5) and to have asistance of counsel for his defense."

Not one of these rights was protected against the action of the Government in the Roman law countries at the time of the adoption of the Constitution, and they are clearly common law rights in their genesis and development. They were totally opposed to the inquisitorial system of the civil law. They are thus exactly in the same category with the right to be tried only upon presentment by a grand jury and to be convicted only upon a unanimous verdict of a petit jury. *No refinement of philosophy can segregate the rights contained in these two amendments into different classes.*

Should the Court, therefore, adopt the view of counsel for the Territory, that Congress has not extended the Constitution to Hawaii by the Joint Resolution, and hence the inhabitants of that Territory could lawfully be tried without indictment, such a decision would be equally authority for the proposition that they were likewise without the protection of the other rights mentioned.

In conclusion upon this point, it is respectfully submitted that (1) neither the suggested distinction between natural and artificial rights, nor (2) the distinction between the prohibitions going to the root of the power and those regulating its exercise are sound or based upon any consistent theory.

If in the lapse of time some of the rights guaranteed by the Constitution may be deemed of less importance than formerly, it may be that the people should be called upon in the regular way to amend that instrument. The framers believed jury trial to be an essential element of liberty. Possibly some of our people no longer take that view. The change in public sentiment, if such there be, cannot be sufficient reason to induce this Court to make a decision which will, for the first time, be authority for the proposition that law courts, acting under United States authority, may in our own domestic territory, without acting "contrary to the Constitution," violate every right which English speaking men have considered vital since the barons humbled King John at Runnymede.

It is quite impossible to hold that Osaki Mankichi might lawfully have been convicted without the intervention of a grand jury and the unanimous verdict of a petit jury without also holding that his property might have been taken for public use without just compensation, or that he might have been compelled in this case to be a witness against himself without having been informed of the nature and cause of the accusation or allowed to have process for obtaining witnesses, or assistance of counsel for his defense, and that having been convicted by these methods, he might have, if the municipal law of the Territory sanctioned it, been condemned to burning at the stake.

Can such doctrine obtain the sanction of this Court? There can be no reversal of this decision unless the Court be prepared to go to that length.

In conclusion, we submit that

(1) By the act of Congress annexing the Hawaiian Islands, its legislation was intended to be made to con-

form to the requirements of the Fifth and Sixth Amendments, as is the case in other Territories of the United States. This is the plain meaning of the language employed.

(2) The situation of Hawaii was such that Congress evidently considered its institutions assimilable to those of the United States, and that to give any other interpretation to the language of Congress would be a plain violation of the spirit as well as of the letter of the Joint Resolution.

(3) To argue that the words "nor contrary to the Constitution" mean nothing, but were employed to show that Congress understood the Constitution to carry some vague kind of humanitarianism based upon a supposed "law of nature" into Hawaii is utterly unsound and wholly fanciful.

The decision of the Court below should be sustained.

All of which is respectfully submitted.

New York, February 25th, 1903.

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APPENDIX.

Joint resolution to provide for annexing the Hawaiian Islands to the United States (30 Stat. 750.)

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.*

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved July 7, 1898.

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Supreme Court of the United States.

THE TERRITORY OF HAWAII,
Appellant,

vs.

OZAKI MANKICHI,
Appellee.

Brief for Appellee in Reply.

These Memoranda are intended as answers to various suggestions made during the oral argument and partly embodied in the Points submitted by the Solicitor-General.

THE INSULAR CASES

Irrelevant to the contentions in this case.

The doctrine laid down in the several Insular cases is not invoked or brought in question in the present case.

De Lima v. *Bidwell* held that after cession by Treaty, Porto Rico ceased to be a foreign country in the contemplation of the tariff laws.

Downes v. *Bidwell* held that although territory annexed by Treaty ceased to be foreign, the mere cession did not make it an integral part of the United States to which the rule of uniformity of imposts applied, and that Congress could constitutionally legislate for such territory a tariff, without regard to the uniformity clause of the Constitution.

That was in effect what Congress did by the Joint Resolution annexing Hawaii. It annexed the territory, making applicable to its legislation the restrictions of

the Constitution, and excepting from such application the customs laws and regulations.

The claim made on behalf of Mankichi is not therefore in conflict with the doctrine of the Insular Cases and there is no occasion to discuss such doctrine in the present case.

There is no question here touching the power of Congress to govern "dependencies" or unincorporated territory.

That power was distinctly exercised by Congress in the passage of the Joint Resolution. The Constitution was made the test of the validity of Hawaiian legislation except in reference to the collection of imposts and the immigration of Chinese.

The rightful exercise of this power is not here disputed; the only question before the Court is as to the intent, effect and purpose of Congressional legislation passed in the exercise of that power.

In other words, did Congress intend by that provision of the Joint Resolution which declares that only such municipal legislation of Hawaii as is not contrary to the Constitution should remain in force, to make the provisions of the Constitution a test of the validity of legislation which permitted the trial of all persons accused of infamous crimes upon information instead of indictment and the conviction of such accused persons by a vote of nine jurors out of twelve?

THE INTENTION OF CONGRESS AS EXPRESSED IN THE JOINT RESOLUTION.

Mr. Justice White observed during the Argument that the Court must, of course, be at liberty to look into the consent and cession on the part of Hawaii, referred to in the Joint Resolution, in order to determine its intent and meaning.

This is unquestionably true. Fortunately the Joint Resolution itself recites the very conditions of the consent and cession.

In giving the insructions accompanying the Joint Resolution, Secretary William R. Day, under date of

July 8th, 1898, says (Appendix to Solicitor-General's Brief on Submission):

> "These recitals, it will be observed, are made in "the language of the Treaty of Annexation, con- "cluded at Washington on the 16th day of June, "1897. They, as well as the other terms of that "Treaty, were advisedly incorporated into the "Joint Resolution, because they embodied *the* "*terms of cession* which have not only been agreed "upon by the two Governments, but which have "also been ratified by the Government of the Re- "public of Hawaii. The Joint Resolution, there- "fore, accepts, ratifies and confirms, on the part of "the United States, the cession formally agreed to "and approved by the Republic of Hawaii." (H. R. Rep. No. 305, 56th Cong., 1st Session p. 3)

The plain intent of the conditions imposed and assented to should be carried out and we ask no more.

The terms of this consent and cession are in a proposed Treaty of June, 1897, signed by Secretary Sherman, on the part of the United States, and by three Commissioners on the part of Hawaii. (Senate Report, No. 681, 55th Congress, 2nd session, March 16th, 1898, pp. 96 and 97).

The preamble to this Treaty expresses the "desire of the Government of the Republic of Hawaii that those Islands should be incorporated into the United States *as an integral part thereof and under its sovereignty,*" and that the two Governments "have determined to accomplish by Treaty an object so important to their mutual and permanent welfare."

The remainder of the Treaty contains the exact language reproduced by the Joint Resolution, including the provision that only such municipal legislation of the Hawaiian Islands, not inconsistent with the Treaty nor contrary to the Constitution of the United States, should remain in force.

A previous Treaty of Annexation negotiated in 1854, under President Pierce, Mr. Marcy being Secretary of State, contemplated the conferring of full statehood on the Hawaiian acquisition, and contained a similar provision, to wit:

"Article VII. The laws of the Hawaiian King-
"dom so far as they are compatible with Repub-
"lican institutions and conformable to the Consti-
"tution of the United States, shall be and remain
"in full force and effect until modified, changed
"or repealed by the legislative authority of the
"State contemplated by this Treaty." (Senate Report cited above, pp. 91 and 92).

Secretary Sherman in his Report to President McKinley accompanying and recommending the Treaty of 1897, says:

"There remained therefore the annexation of
"the Islands and their complete absorption in the
"political system of the United States as the only
"solution satisfying all the given conditions and
"promising permanency and mutual benefit. *The*
"*present Treaty has been framed on that basis.*
"(p. 75). As in previous instances when the
"United States has acquired territory by Treaty,
"it has been necessary to reserve all the organic
"provisions for the action of Congress. If this
"was requisite in the case of the transfer to the
"United States of a part of the domain of a titular
"sovereign, as in the cession of Louisiana by
"France, of Florida by Spain, or of Alaska by
"Russia, it is more requisite when the act is not
"cession but *union involving the complete incor-*
"*poration of an alien sovereignty into the body*
"*politic of the United States.*

"For this the only precedent of our political
"history is found in the incompleted Treaty during
"President Grant's administration of November
"29th, 1869, for the annexation of the Domini-
"can Republic to the United States.

"Following that example the Treaty now signed
"by the plenipotentiaries of the United States and
"the Republic of Hawaii reserves to the Congress
"of the United States the determination of all
"questions *affecting the form of government* of the
"annexed territory, the *citizenship* and elective
"franchise of its inhabitants and *the manner in*
"*which the laws of the United States* are to be ex-
"tended to the Islands. (p. 76).

"It was necessary to stipulate, as in the Domini-
"can precedent, for continuing the existing *ma-*
"*chinery* of the government and laws in the Ha-

"waiian Islands until provision shall be made by "law for the government, as a Territory of the "United States, of the *domain thus incorporated* "*into the Union;* but having in view the particu- "lar status created in Hawaii by laws enacted in "execution of Treaties heretofore concluded be- "tween Hawaii and other countries, *only* such Ha- "waiian laws are thus provisionally continued as "shall not be incompatible with the Constitution "or laws of the United States, or with the provis- "ions of this Treaty." (p. 76). (Senate Document cited above, pp. 75 and 76).

In addition to this evidence from Secretary Sherman showing the intent of the Treaty to be the "complete absorption of the Islands in the political system of the United States," the complete incorporation of an alien sovereignty into the body politic of the United States, the incorporation of the Hawaiian Islands into the Union, we have the Message of President McKinley of June 16th, 1897, to the Senate, accompanying the Treaty, in which he says:

"Not only is the union of the Hawaiian Terri- "tory to the United States no new scheme, but it "is the inevitable consequence of the relations "steadfastly maintained with that mid-Pacific do- "main for three-quarters of a century; its accom- "plishment, despite successive denials and post- "ponements, has been merely a question of time. "While its failure in 1893 may not be a cause of "congratulation, it is certainly a proof of the dis- "interestedness of the United States, the delay of "four years having abundantly sufficed to estab- "lish the right and the ability of the Republic of "Hawaii to enter as a sovereign contractant upon "a conventional union with the United States, thus "realizing a purpose held by the Hawaiian people "and proclaimed by successive Hawaiian Govern- "ments through some twenty years of their virtual "dependence upon the benevolent protection of the "United States. *Under such circumstances, an-* "*nexation is not a change, it is a consummation.*" (Senate Document last cited, p. 66).

In proposing the Treaty of 1893, the Hawaiian Commissioners wrote to Mr. Foster, Secretary of State,

under date of Washington, February 4th, 1893, stating the proposals of the Hawaiian Government for such a Treaty.

Article 11 of these proposals is:

> "That all laws *and the system of criminal and* "*civil jurisprudence* in force in the Hawaiian "Islands at the date of the ratification of such "Treaty which are not specifically abrogated or "modified by the terms of the Treaty *or which* "*are not inconsistent with the Constitution of the* "*United States,* shall remain in force until the "same are regularly repealed by the appropriate "authority." (Senate Document, No. 76, 52nd Congress, 2nd session; Papers relating to the Annexation of the Hawaiian Islands, 1893, pp. 39 and 40).

The Treaty of 1893, as finally negotiated by Mr. Foster, did not contain the provisions found in the earlier Treaty of 1854 and in the later Treaty of 1897 for abrogation of any Hawaiian legislation inconsistent with the Constitution. This is explained by the following passage from Secretary Foster's letter to President Harrison, accompanying the Treaty:

> "As there is no provision in the existing legis- "lation of Congress *whereby the Executive power* "*can provide an organized form* of government for "new territory annexed to the Union, *or extend* "*over it the laws of the United States* and cause "the same to be executed, it was deemed necessary "to continue the existing government and laws of "the Hawaiian Islands *until Congress should have* "*an opportunity to legislate on the subject;* but a "provision has been inserted in the Treaty for the "exercise by the Executive of the United States "of a veto power upon the acts of that government "during the interregnum." (Annexation of the Hawaiian Islands, 1893, pp. 5 and 6).

This referred, it will be noted, to the operation of a *Treaty,* and the power of the *Executive* to provide a Government for Hawaii, and extend the laws of the United States over it; it assumes the right of *Congress* to do so.

In the present case we have a proposal from Hawaii, in the form of an executed Treaty, for a cession of territory, upon certain conditions, including the continuance of such municipal legislation as was not contrary to the Constitution. This Treaty was not ratified by the Treaty-making power; but *Congress* took into account the proposals which it contained, and in the exercise of its conceded power, accepted the cession of the territory *on the conditions named by Hawaii* and did, what Mr. Foster says was beyond the power of the Executive to do, to wit: "legislated upon the subject," and by the plain terms of the Joint Resolution provided some form of government and imposed upon the Territory the will of the President as to the officers of such government and as to "the manner in which they should exercise" their offices; imposed upon the Territory the laws of the United States as to the immigration of Chinese, and "legislated" that only such municipal laws should remain in force as were "not contrary to the Constitution."

The Joint Resolution, it will be recalled, provides for the appointment of Commissioners to recommend to Congress such legislation as may be deemed necessary or proper. From the Report of this Commission in 1898 (pp. 16 and 17), we quote those passages which explain why in the Organic Act, two sections, sections 5 and 6, were inserted in which reference was made to the binding force of the Constitution of the United States, as is already noted in pages 10 and 11 of "Additional Brief for Appellee."

> "The existing laws of Hawaii not inconsistent
> "with the Constitution and the laws of the United
> "States or of this act shall continue in force subject
> "to repeal or amendment by the legislature of
> "Hawaii or by Congress." (p. 16).

This, as will be seen, is the exact equivalent of the language of the Joint Resolution, and is found in Section 6 of the Organic Act.

In reference to the provision in Section 5 of the Organic Act the Commissioners say:

"The bill provides that the Constitution and "laws of the United States locally applicable shall "have the same force and effect in the Territory of "Hawaii as elsewhere in the United States." (p. 16).

"This is the usual provision found in the Acts "of Congress providing for the establishment of "territorial governments in the United States here-"tofore. Such a provision is very important in "this bill for many reasons, among which may be "mentioned the continued importation of Coolie "Labor into Hawaii. It has been the policy of the "Government of Hawaii before and since the es-"tablishment of the Republic *to import men under "labor contracts* for a term of years, at the expira-"tion of which time they are to return to the coun-"tries from which they came. Those brought in "are mainly from China and Japan. (p. 16).

"Of course it becomes necessary *to extend our "labor laws over the island* so as to prohibit all "kinds of foreign contract labor from coming to "the territory, first, because it is the policy of this "country to keep out all kinds of cheap foreign "labor, including Coolie Labor and thereby pre-"vent such labor from interfering with the wages "of American labor, and secondly, to protect our "manufactured products from competition with "manufactured goods produced by cheap alien "labor. The general laws of the United States "will place the people of the Territory on the same "footing with the people of the States and of other "Territories of the United States in regard to for-"eign labor." (pp. 16 and 17, Report of Hawaiian Commission, 1898).

These extracts, we respectfully submit, explain clearly why in the Organic Act, Congress inserted, in addition to the language of the Joint Resolution, the section specifically extending the Constitution *and the laws* of the United States over the Territory.

Finally, the necessity for further legislation, such as is found in the Organic Act, is explained by the Report of the House Committee on Territories (H. R. Report, No. 305, 56th Congress, 1st session, February 12th, 1900), recommending the passage of the Territorial Government Act.

We quote from this Report at pages 4 and 5:

"There is imperative need of early enactment "of an Organic Act for Hawaii. The Joint Reso- "lution of July 7th, 1898, providing for the an- "nexation of the Hawaiian Islands declares that "the Hawaiian municipal laws not contrary to the "United States Constitution or inconsistent with "the terms of that Resolution, remain in force "until Congress enacted laws. (p. 4.)

"Meanwhile it has become apparent that there "is much doubt of the extent of the power granted "to the local government of Hawaii by the pro- "visions of the Joint Resolution, and that in many "important respects there is something like an "interregnum in Hawaii. (p. 4.)

"Many doubtful questions of admiralty and "maritime jurisdiction have arisen as well as crim- "inal procedure, rendering it uncertain whether "there is now any tribunal for the decision of im- "portant questions affecting property and any "existing method by which criminals may be in- "dicted or legal juries impaneled for their trial." (p. 5).

The report continues to the effect that there was grave doubt in regard to a number of other governmental powers, including the granting of franchises, disposition of public lands, operation of the Homestead Law, importation of Japanese laborers, etc. (p. 5).

It seems apparent from these extracts from the Committee's Report that any additional provisions in the Organic Law were not meant to confer new powers, but to supply the customary details of legislation and, at most, to set at rest any doubts that had arisen in the interpretation of the Joint Resolution.

Had it been otherwise, the Committee would have called the attention of Congress to the necessity of providing for what had been left unprovided for, instead of raising doubts as to the purpose and effect of the legislation embodied in the Joint Resolution.

RESTRICTIONS OR EXCEPTIONS IN JOINT RESOLUTION.

All the conditions imposed by Hawaii to the annexation are repeated in and accepted by the Joint Resolution, such as the immediate extension of constitutional privileges to the Islands; the subsistence of their land laws and customs relations; the prohibition of the immigration of Chinese.

This may create a situation analogous to that pointed out by Mr. Justice White's opinion in Downes *v.* Bidwell, as controlling the Territory of Louisiana; although Louisiana was fully incorporated under the Act of 1805, certain commercial privileges were allowed French and Spanish vessels, which would be incompatible with the uniformity required by the Constitution; as to these privileges only, the incorporation was held in abeyance.

This, Mr. Justice White observed from the bench, was owing to the obligations of the Treaty which Congress respected. The analogy between the two cases seems complete, for in the present case Congress respected the conditions embodied in the Treaty Agreement with Hawaii, which conditions imposed the exceptions referred to.

Whether such restrictions are valid or invalid,—whether it is within the power of Congress to impose them, is of no moment; their invalidity would not affect the privileges conferred by the Joint Resolution; if invalid, then incorporation might be complete; if valid, then only the rights or privileges excepted can be refused to such territory.

The Legislative as well as all other "civil powers" was included in the clause which prescribed that these various powers should be exercised "in such manner as the President of the United States shall direct," and in accordance with such power, before the time fixed for the meeting of the Legislature, President McKinley prorogued it. (Solicitor-General's Point XII). It is clear that by the exercise of the same power, the President could have called it together at any time, upon a day's notice if need be, and if on the passage of the

Joint Resolution, it had been requisite to pass any act for changing the criminal procedure, the Legislature under the new Government, of which it formed a part, could readily have been summoned for that purpose.

THE JOINT RESOLUTION PROVIDED A GOVERNMENT FOR HAWAII.

The Solicitor-General has laid some stress upon the proposition that until the Organic Act went into operation the Government of the Republic of Hawaii continued, and that then, for the first time, was there any government of the Hawaiian Islands provided for or undertaken by Congress.

This is a great mistake. The Joint Resolution provided very emphatically for the Government of Hawaii, under the authority of the United States.

All the civil, judicial and military powers exercised by the officers in the Islands were vested in the appointees of the President of the United States, and all such powers were to be exercised "*in such manner as the President of the United States shall direct.*"

The President was given absolute power to remove all such officers and to fill vacancies.

This was clearly a government of the Hawaiian Islands under the authority of the United States.

Under this power, as we have seen, he prorogued the Legislature. He re-appointed the officers "of the Republic of Hawaii *as it existed* just prior to the transfer of sovereignty." He required all such officers to take an oath of allegiance to the United States. He required all bonded officers to renew their bonds to the Government of the United States. (Sec'y Day's Instructions—Appendix to Solicitor-Genl's Brief on Submission—pp. 33-34.)

All existing Treaties of the Hawaiian Islands were abrograted; further immigration of Chinese into the Islands was prohibited "except upon such conditions as are now or may hereafter be allowed *by the laws of the United States;*" certain legislation of the Islands was continued in force by virtue of the Joint Resolution,

to wit, the customs laws and all other legislation not inconsistent with the Constitution. In other words, Congress re-enacted, as its own, all the municipal legislation of Hawaii not contrary to the Constitution; it re-enacted the customs laws and regulations of Hawaii; it enacted a law prohibiting the immigration of Chinese.

All these are Supreme Acts of Government and the law under which they could lawfully be done most certainly established a system of Government for Hawaii, however temporary in its duration.

As the Solicitor-General admits, the Commissioners might never have recommended any further legislation; to quote his language: "it was not even known whether a new house would be needed." (close of Point V).

The authority given to the President in the Joint Resolution to appoint Commissioners to "recommend to Congress such legislation concerning the Hawaiian Islands as they *shall deem necessary or proper*" (p. 9), the Solicitor-General considers as establishing the fact that "until such time as Congress, acting upon the recommendations of the five Commissioners, should frame a permanent government under which the Islands might be incorporated into the United States," Hawaii could not be so incorporated.

But what if these Commissioners should not deem any legislation "necessary or proper"? They were to be the judges as to whether any legislation was requisite or useful, and they might well have been content with the municipal legislation of Hawaii as controlled and limited by the Joint Resolution. In such a case would there have been no incorporation, and would the provision of the Joint Resolution, to which we have alluded, have remained barren and ineffective?

The Territorial Act of April 30, 1900, usually referred to as the Organic Act, simply provided further government. The government first established was temporary; the government established by the Organic Act was meant to be permanent. This was the understanding of the House Committee that reported the Organic Act, as will be seen from this pertinent quotation:

> " The language of the Joint Resolution shows " that the *government provided* was intended as an " expedient to cover the time that must elapse be- " tween the passage of the Resolution and the estab- " lishment of a permanent form of government, " and the nature of the *temporary government* is " such that it ought not to continue longer than is " required by absolute necessity." (p. 4, Report of Committee on Territories, H. R., February 12, 1900).

The Government of Hawaii was indeed, as the President intended, "continued without interruption," *but not without change*. From the time of the Joint Resolution the sovereignty of Hawaii had passed away, and the territory was under the sovereignty of the United States and governed by its Federal agencies.

COMMON LAW RIGHT TO IMPANEL GRAND JURIES:

It has been urged that there was no "statute" in Hawaii providing for the impaneling of grand juries and that this would be an obstacle to the administration of justice if Mankichi's claim prevails.

The case of the U. S. v. Hill, 1 Brock., 156, 159, decided by Chief Justice Marshall, at Circuit, would seem to settle that question as it sustains the right of a Court having criminal jurisdiction to do whatever is necessary for its exercise, *i. e.*, to impanel such grand and petit juries as may be requisite for the proper exercise of its jurisdiction.

This position is further maintained by this Court in United States *v.* Clawson, 114 U. S., 486, which goes farther than the case of the United States *v.* Hill.

In the Clawson case, from Utah, it appeared that the impaneling of grand and petit juries *was* regulated by Statute, which provided how the list should be made up and the juries drawn; the jury lists made up in conformity with this Statute were exhausted and the Court exercised the common law power of additional venires; eleven out of twelve jurors who tried Clawson were selected from these additional panels and only one out of

the panel made up from the Statutory list. Upon exception to this method as contravening the Statute which regulated the summoning and impaneling of jurors this Court held that after exhausting the means provided by the Statute the Court had power to resort to common law methods to procure the juries necessary for the exercise of its criminal jurisdiction.

The Common Law of England was made the law of Hawaii, except as altered by Constitution or Statute (Solicitor's Point XIII); the criminal procedure was altered by Statute so as to diminish the rights and immunities accorded to the accused by the Common Law and accorded by the Constitution of the United States to all persons subjected to prosecution under authority of the Federal Government.

These Statutes could not remain in force after the Joint Resolution, and the common law rules, unaffected by them, took their place.

COMPOSITION OF JURIES.

Counsel for the Territory of Hawaii urge that if Mankichi's contention is sound, it would have been impossible to obtain grand or petit juries in Hawaii, as such juries must be composed of citizens, and there were not enough citizens of the United States in the Islands to make up the juries.

There is no constitutional provision requiring juries —grand or petit—to be made up of citizens.

The utmost that the common law required of a juror was that he should be a free and lawful man, generally a freeholder. This did not require the attributes of citizenship. It did not require a man possessing all the political rights and privileges of a citizen. What it required was allegiance to the King. In other words, *non-alienage*. Throughout the United States the qualification of a juror has been again and again recognized as sufficient if he is an "elector," and in many States residents are allowed to be "electors" who are not naturalized or native citizens.

By the Northwest Ordinance, persons who have re-

sided a certain period and are freeholders are allowed to be "electors" and citizens of the United States are allowed to be "electors"; it is obvious that either of these categories, both placed upon an equal footing as to the electorate, would, in the absence of any Statute prohibiting it, be equally qualified for jury duty.

The qualifications of jurors and all the regulations for the impaneling of juries are matters of local concern and local jurisdiction. The Constitution of the United States, as we have said, contains no prescription in reference thereto. The laws of the United States prescribe that for all Courts of the United States the regulation of the various localities where they sit shall control the selection and qualification of jurors; in territories local territorial acts regulate the question.

Under these circumstances, when Hawaii became a part of the United States by the operation of the Joint Resolution, all native born inhabitants of Hawaii ceased to owe any allegiance to the former Republic of Hawaii and owed allegiance to the United States; there was no other sovereignty in the Islands than the sovereignty of the United States. Under the strictest rule, therefore, native inhabitants of the Hawaiian Islands, owing allegiance to the Government of the United States, would be competent jurors.

Moreover, as the qualification of jurors and the rules for impaneling the juries are matters of local concern, they were governed in Hawaii by the local laws then in force; these local laws were not "contrary to the Constitution," for the Constitution does not prescribe the qualifications of jurors; they therefore remained in force by the express provision of the Resolution, and under those local laws juries could be impaneled and the qualification of jurors determined.

There was therefore no such practical difficulty as our opponents depict in getting competent grand and petit juries to indict and to try all persons accused of crime.

FUNDAMENTAL RIGHTS—THE STATES AND THE GENERAL GOVERNMENT.

It is insisted by the Solicitor-General that the purpose of the restriction in the Joint Resolution forbidding that any municipal legislation should remain in force which was contrary to the Constitution, was merely to declare that certain

> " fundamental rights and principles, the basis of all
> " free government, which cannot with impunity be
> " transcended,"

were protected in Hawaii. (Point XI.)

He insists that this

> " follows naturally and irresistibly from other
> " provisions of the Resolution * * * because
> " by the cession the Islands became subject to the
> " dominion of the United States and there are cer-
> " tain limitations of the Constitution which apply
> " wherever the jurisdiction of the United States
> " extends." (Point IX).

If these limitations of the Constitution applied " naturally and irresistibly," then the provision of the Joint Resolution was of *absolutely no effect;* it meant nothing, it accomplished nothing, it added no force to the protection and no certainty to the rights intended to be protected. This construction simply eliminates the phrase from the Joint Resolution.

On the other hand, when we come to the discussion of what are the fundamental rights, which, according to the Solicitor-General, are "naturally and irresistibly" to be protected wherever the jurisdiction of the United States extends, we find that there is difference of opinion, doubt and uncertainty; he frankly admitted on the argument that he could not define them, that the Court had not defined them, and a like frank statement is to be found in his argument of the Insular Cases, 182 U. S., at page 156.

Under these circumstances the provision in the Joint Resolution becomes natural, proper and effective; it signifies that whatever may be the doubts as to which

fundamental rights are protected by the spirit of the Constitution, there shall be no question as to what rights shall be protected in Hawaii; and any legislation violative of any right which can find an asylum in any nook or corner of the Constitution is set at naught.

A few words more in reference to fundamental rights may be permissible here. It is not a question of "natural rights" or of the "fundamental rights" of man, but of the *fundamental rights of all men living under the sovereignty of the United States, as against the agencies of the Federal Government.*

These are illustrated by the earliest compact for the protection of those rights—the Northwest Ordinance. This Ordinance was made, to quote from its language, for the purpose of

> "extending the fundamental principles of civil and
> "religious liberty which formed the basis whereon
> "these Republics, their laws and Constitutions, are
> "erected."

In the statement of these fundamental principles contained in Articles I and II, we find:

The right not to be molested on account of one's mode of worship or religious sentiment;

The right to the writ of habeas corpus;

The right to a trial by jury;

The right not to be deprived of liberty or property but by the judgment of one's peers.

These are, as this Court said in McAllister *v.* U. S., 141 U. S., at p. 188, among the

> "essential principles *upon which our system of*
> "*government rests,* and which are embodied in the
> "Constitution."

If we have not entirely misunderstood both the Ordinance and this decision, among the "fundamental rights which form the basis whereon these Republics, their laws and Constitutions, are erected," among the "essential principles upon which our system of government rests, and which are embodied in the Constitu-

tion," is the right of everyone living under the sovereignty of the United States to be free from any prosecution for crime at the hands of the central authority to which the Government of the Union was deputed, unless after indictment by a grand jury of his fellows; and, the right to be acquitted, unless found guilty by the unanimous verdict of a petit jury of twelve.

That these rights have not always been respected by the various States is to be deplored, and it is perhaps to be deplored that in surrendering various privileges of sovereignty to a Central Government the States did not clearly surrender the right to accusation and trial by any other means than those consecrated by Magna Charta.

However this may be, it is quite enough that the States should have reserved and should be permitted such a privilege; it is very clear that no such right or privilege was *granted* to the Federal Government or to any of its governmental agencies.

The language of Callan *v.* Wilson, 127 U. S., at pp. 549 and 550, is apposite on this point:

> "As the guarantee of a trial by jury, in the third "article, implied a trial in that mode and accord- "ing to the settled rules of the common law, the "enumeration, in the Sixth Amendment, of the "rights of the accused in criminal prosecutions, "is to be taken as a declaration of what those rules "were, and *is to be referred to the anxiety of the "people of the States* to have in the supreme law "of the land, and *so far as the agencies of the Gen- "eral Government were concerned,* a full and dis- "tinct recognition of those rules, as involving the "fundamental rights of life, liberty, and property."

The fact that the State may restrict the privilege of its citizens to the intervention of grand and petit juries, the Solicitor-General makes the basis of the question: Why, if the constitutional guarantees do not tie the hands of the inhabitants of a Territory when organizing a State, should they be held to tie the hands of Congress with regard to the Territory?

This was the point urged in Thompson *v.* Utah. Utah as a Territory was only doing what a State of the

Union might lawfully do under the Constitution, and yet this Court held that, as a Territory, it could not do what it afterwards did as a State.

The answer to the Solicitor's doubt seems clear. It is because the State *governs itself*,—by the vote of its own citizens and the privilege of self-government consists in the right of a State to govern itself as its people see fit, while the government of organized Territories or of annexed territory by a Central Power, without any direct voice of the people governed, is in its nature and essence unrepublican and of dangerous tendency, and the exercise of such a power, if it must be borne at all, is to be properly circumscribed by such constitutional limitations as have been placed upon the Central Government by the people who organized it.

Reference was made to the Instructions of President McKinley to the Philippine Commission as embodying a statement of some of the fundamental principles which are everywhere entitled to protection. It must be borne in mind that at the date of these Instructions, military commanders were the organs of government and the source of authority in the Philippine Islands.

> "It is probable," said Mr. McKinley, "that the "transfer of authority from military commanders "to civil officers will be gradual and will oc- "cupy a considerable period. Its accomplishment, "and the maintenance of peace and order in the "meantime, will require the most perfect co- "operation between the civil and military authori- "ties in the Islands, and both should be directed, "during the transition period, by the same Execu- "tive Department."

It is not necessary here, with reference to the rights of the Appellee, Mankichi, to discuss the legality or the wisdom of the government of the Philippines, nor is it necessary to withhold a tribute to the earnest efforts of the authorities to deal honorably and efficiently with a situation of unusual difficulty and complication. It is sufficient for our present purpose to show that Mr. McKinley's efforts were to reconcile a condition of insurrection in a newly-acquired territory with the extension of such civil rights as he thought would tend to the

pacification of misguided men and yet not act as an encouragement to malicious men.

With this desire, he instructs the Commission to bear in mind the "happiness, peace and prosperity of the people of the Philippine Islands," and recommends that "the measures adopted should be made to conform to "their customs, their habits and even their prejudices, "to the fullest extent consistent with the accomplish- "ment of the indispensable requisites of just and effect- "ive government;" but even with this desire not to disturb the habits of ages he insists that "there are certain great principles of government which have been made the basis of our governmental system," and such of these as can, in his opinion, reasonably be made applicable in the Philippines he instructs the Commission always to respect. Among these are the rules

> "that in all criminal prosecutions, the accused "shall enjoy the right to a speedy and public "trial, to be informed of the nature and cause "of the accusation, to be confronted with the "witnesses against him, to have compulsory "process for obtaining witnesses in his favor "and to have the assistance of counsel for his "favor and to have the assistance of counsel for his "defense; that excessive bail shall not be required, "nor excessive fines imposed, nor cruel and unu- "sual punishment inflicted; that no person shall be "put twice in jeopardy for the same offense or be "compelled in any criminal case to be a witness "against himself."

According to the contention of the honorable Solicitor-General none of these "great principles of government which have been made the basis of our governmental system" were operative in Hawaii after the passage of the Joint Resolution, although this Resolution distinctly made the Constitution of the United States the criterion of the validity of all legislation there,—a situation far in advance, as regards incorporation into our Union, of the situation in the Philippines.

THE ROSS CASE:

Is this case authority for holding that Congress may authorize trials of criminals in other ways than required by the Constitution? It is not, for this reason: The injunctions of the Constitution upon Congress relate only to actions within the jurisdiction and sovereignty of the United States; Congress had no jurisdiction or sovereignty in Japan; it was the sovereignty of Japan that tried and condemned Ross; by courtesy, comity or Treaty, Japan permitted the displacement of its laws and they adopted at our instance some safeguards unknown to their usual legislation in the trial of American criminals; those safeguards became for the moment Japanese law, enforced by a Japanese sovereignty. No constitutional privileges, no statutory requirements were of avail in Japan, except such as Japan chose to adopt as its own law for the occasion. Congress therefore transcended no constitutional prerogative in providing the officials whom Japan was willing to invest with judicial functions within its sovereignty.

There was no such situation in Hawaii; there was no Hawaiian sovereignty after the 7th of July, 1898; the only sovereignty there was the sovereignty of the United States exercised by Congress, not by the permission of Hawaii, but because of the abandonment and surrender of Hawaiian sovereignty to the United States.

INCORPORATION.

It is not necessary to the protection of Mankichi's rights that Hawaii should have been incorporated into the Union, under the theory of the concurring opinion in Downes *v.* Bidwell.

It is sufficient that Congress, in the exercise of a power which this Court has recognized, should have conferred upon Hawaii such constitutional rights or privileges as would insure to its inhabitants the protection of the criminal procedure to which the Federal Government was itself restricted.

It may not, however, be out of place to call attention

to the Treaty which Government counsel have invoked as establishing the conditions upon which Congress attached the Territory of the Hawaiian Islands to the United States and acquired sovereignty over that Republic.

> The preamble of the Treaty states that "the "United States and the Republic of Hawaii, in "view * * * of the expressed desire of the "Government of the Republic of Hawaii that those "Islands should be *incorporated into the United "States as an integral part thereof*, and under its "sovereignty, have determined to *accomplish by "Treaty an object so important* to their mutual and "permanent welfare."

The purpose and object of the Treaty was therefore clearly to incorporate the Territory and to make it an *integral part* of the United States. Possibly the fear that this could not be accomplished by the Treaty-making power is responsible for the adoption of another method, and for the interposition of both branches of Congress, by means of the Joint Resolution.

Although that specific language was not reintroduced into the Resolution, the essential bond of union which that language imported, to wit, the application of the Constitution of the United States to the Territory so acquired, was an element of the annexation; and there is no peculiar virtue in that form of words to carry with them greater or other privileges than their equivalents in other forms.

For instance, it was suggested during the argument by Mr. Justice White, when the Solicitor-General declined to be responsible for any form of language effecting incorporation, that the language of the Northwest Ordinance,—that the Territory should always be a part of the United States,—was effective to incorporate. To this it may be observed, that the language of the Northwest Ordinance did not *make* that Territory a part of the United States; the Territory already belonged to several of the original States; it was already a part of the confederacy, —the United States in its present form did not yet exist. The exact language is this:

"Art. IV. The said territory and the states
"which may be formed therein shall *forever remain*
"a part of this confederacy of the United States of
"America, subject to the articles of confederation
"and to such alterations therein as shall be consti-
"tutionally made."

This stipulation did not create any new status of "incorporation;" it merely concluded a compact that such status should never be disturbed; it did not incorporate; at most, it stipulated against disintegration.

Such as it was, however, it is not to be found in the Organic Act for the Government of Hawaii any more than in the Joint Resolution; and the Organic Act, it is admitted by counsel for the Government, did make the Territory an integral part of the United States.

We have seen nothing in the arguments presented that shakes our confidence in the simple proposition that Congress, in the exercise of its power of government over territory of the United States, has chosen to enact for that Territory such legislation as shall invest all its inhabitants with the privileges and immunities guaranteed by the Constitution against the action of the general government; and that this action of Congress was lawful; was within its rights and attributes, and gave to Mankichi, the appellee, the right to be free until accused of crime by a grand jury of the country, and to be liberated from such accusation, unless found guilty by the unanimous verdict of a petit jury.

Dated New York, March 12th, 1903.

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Supreme Court of the United States.

No. 219—October Term, 1902.

The Territory of Hawaii, Appellant, vs. Osaki Mankichi. } Appeal from the District Court of the United States for the Territory of Hawaii.

[June 1, 1903.]

This was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict.

Following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a Territory of the United States, the prisoner was tried upon an indictment much in the form of an information at common law, by the Attorney General, and endorsed "a true bill found this fourth day of May, A. D. 1899. A. Perry, first judge of the Circuit Court," &c.

From an order of the United States District Court discharging the prisoner the Attorney General of the Territory appealed to this court.

Mr. Justice Brown delivered the opinion of the Court.

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7, 1898, (30 Stat. 750,) known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its constitution, the Hawaiian Islands, and their dependencies, were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The material parts of this resolution are printed in the

margin.* Though the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "Territory of Hawaii." (31 Stat. 141.) By this act the Constitution was formally extended to these islands (sec. 5) and special provisions made for empanelling grand juries and for unanimous verdicts of petty juries. (Sec. 83.)

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grand and petit jury, which had been held applicable to other organized territories, (*Webster* v. *Reid*, 11 How. 437; *American Pub. Co.* v. *Fisher*, 166 U. S. 46; *Thompson* v. *Utah*, 170 U. S. 343,) though we have also held that the States, when once admitted as such, may dispense with grand juries, (*Hurtado* v. *California*, 110 U. S. 516,) and perhaps also allow verdicts to be rendered by less than a unanimous vote. (*American Pub. Co.* v. *Fisher*, 166 U. S. 46; *Thompson* v. *Utah*, 170 U. S. 343.)

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*Joint resolution to provide for annexing the Hawaiian Islands to the United States (30 Stat. 750).

Whereas the government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

* * * * * *

Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modelled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be

such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nation. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

* * * * * * *

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires (Amendment 5) that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and (Amendment 6), that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fisk*, (23 Wall. 374, 380): "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York, (subsequently Mr. Justice Thompson of this court,) in *People* v. *Utica Ins. Co.*, (15 Johns. 358, 381): "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers."

Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the doctrine more broadly stated than in *United States* v. *Kirby*, (7 Wall. 482,) in which an act of Congress, providing that if "any person shall knowingly and wilfully obstruct or retard the passage of the mail, or any driver or carrier," was held not to apply to a State officer who held a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. "All laws," said the court, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." A case was cited from Plowden, holding that a statute, which punished a prisoner as a felon who broke prison, did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Similar language to that in Kirby's case was used in *Carlisle* v. *United States*, (16 Wall. 147, 153.)

In *Atkins* v. *Disintegregating Co.*, (18 Wall. 272,) it was held that a suit *in personam* in admiralty was not a "civil suit" within the eleventh section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See also *In re Louisville Underwriters*, (134 U. S. 438.) So in *Heydenfeldt* v. *Daney Gold &c. Co.*, (93 U. S. 634, 638,) it was said by Mr. Justice Davis: "If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment." To the same effect are the *Church of the Holy Trinity* v. *United States*, (143 U. S. 457,) in which many cases are cited and reviewed, and *Lau Ow Bew* v. *United States*, (144 U. S. 47, 59.) In this latter case it was held that a statute requiring the permission of the Chinese government, and the identification of "every Chinese person other than a laborer, who may be entitled by treaty or act of Congress to come within the United States," did not apply to "Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes." Said the Chief Justice: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Two recent English cases are instructive in this connection: In *Plumstead Board of Works* v. *Spackman*, (L. R. 13 Q. B. D. 878, 887,) it was said by the Master of Rolls, afterwards Lord Esher: "If there are no means of avoiding such an interpretation of the statute," (as will amount to a great hardship,) "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended." See also *Ex parte Walton*, (L. R. 17 Ch. D. 746.)

Is there any room for construction in this case, or, are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as a part of the territory of the United States and subject to the sovereign dominion thereof;"

2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that until further legislation the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "Territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, that it was provided (sec. 5) that only "the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." There was apparently some discretion left to the courts in this connection. (*Indianopolis &c. R. R. Co.* v. *Horst*, 93 U. S. 291, 299.) The fact already mentioned that Congress in this organic act inserted a provision for the empanelling of grand juries and for the unanimity of verdicts indicates an understanding that the previous practice had been pursued up to that time, and that a change in the existing law was contemplated.

Of course, under the Newlands resolution, any new legislation must conform to the Constitution of the United States, but how far the exceptions to the existing municipal legislation were intended to abolish existing laws, must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in, left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it.

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught.

Surely such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation. The legislature of the Republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended merely for a temporary purpose, and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act.

The language of Mr. Buchanan, then Secretary of State, in holding that the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government, is peculiarly applicable to this case. "The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." (16 How. 184.)

It is insisted, however, that as the common law of England had been adopted in Hawaii by the code of 1897, it was within the power of the courts to summon a grand jury, and that such action might have been taken and criminals tried upon indictments properly found, and convicted by a unanimous verdict. The suggestion is rather fanciful than real, since section 1109 of the Code of 1897, adopting the common law of England contained a proviso that "no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." These laws provided expressly (sec. 616, Penal Laws of 1897) as follows: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." The question thus squarely presented to every judge in the Republic was, whether he was bound to summon a grand jury under the Newlands resolution, when no provision existed by law for empanelling the same or

their payment, and when in so doing he was obliged to ignore the plain statute of his own country.

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.

Inasmuch as we are of opinion that the *status* of the islands and the powers of their provisional government were measured by the Newlands resolution, and the case has been argued upon that theory, we have not deemed it necessary to consider what would have been its position had the important words "nor contrary to the Constitution of the United States" been omitted, or to reconsider the questions which arose in the Insular Tariff cases regarding the power of Congress to annex territory without at the same time extending the Constitution over it. Of course, for the reasons already stated, the questions involved in this case could arise only from such as occurred between the taking effect of the Joint Resolution of July 7, 1898, and the Act of April 30, 1900, establishing the Territorial Government.

The decree of the District Court for the Territory of Hawaii must be reversed, and the case remanded to that court with instructions to dismiss the petition.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 219.—October Term, 1902.

The Territory of Hawaii, Appellant, vs. Osaki Mankichi } Appeal from the District Court of the United States for the Territory of Hawaii.

[June 1, 1903.]

Mr. Justice White and Mr. Justice McKenna concurring.

The court in its opinion disposes of the case solely by a construction of the act of Congress. Conceding, *arguendo*, that such view is wholly adequate to decide the cause, I concur in the meaning of the act as expounded in the opinion of the court, and in the main with the reasoning by which that interpretation is elucidated. I prefer, however, to place my concurrence in the judgment upon an additional ground which seems to me more fundamental. That ground is this: That as a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amendments of the Constitution concerning grand and petit juries were not applicable to that territory, because, whilst the effect of the resolution of annexation was to acquire the islands and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in *Downes* v. *Bidwell*, (182 U. S. 244.)

The resolution of Congress annexing the islands, it seems to me, makes the conclusion just stated quite clear, and manifests that it was not intended to incorporate the islands *eo instanti*, but, on the contrary, that the purpose was, whilst acquiring them, to leave the permanent relation which they were to bear to the Government of the United States to await the subsequent determination of Congress. By the resolution the islands were annexed, not absolutely but merely "as a part of the territory of the United States," and were simply declared to be subject to its sovereignty. The minutest examination of the resolution fails to disclose any provision declaring that the islands are incorporated and made a part of the United States or endowing them with the rights which would arise from such relation. On the contrary, the resolution repels the conclusion of incorpora-

tion. Thus it provided for the government of the islands by a commission, to be appointed by the President until Congress should have opportunity to create the government which would be deemed best. Further, it stipulated "until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged." And, if possible, to make the purpose of Congress yet clearer, the act provided that "the President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper." All these provisions, in my opinion, clearly point out that, whilst the purpose was to acquire and extend the sovereignty of the United States over the islands, it was proposed only to provide by the resolution of annexation a provisional government until Congress should become possessed of the information necessary to enable it to determine what should be the permanent status of the annexed territory. And the meaning of the resolution of annexation thus indicated by its terms is reflexly demonstrated by the act "to provide a government for the Territory of Hawaii," approved April 30, 1900, by which the islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government. When the two acts are put in contrast and the declarations in the later act are considered, which were not found in the earlier act, and which it is to be presumed were intentionally omitted from the resolution providing for annexation, I can see no reason for holding that the mere act of annexation accomplished the result which was brought about by the subsequent law containing the more comprehensive provisions.

The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them. (*Hurtado* v. *California*, 110 U. S. 516; *Ross's case*, 140 U. S. 473; *Bolln* v. *Nebraska*, 176 U. S. 83, and cases cited on page 83; *Maxwell* v. *Dow*, 176 U. S. 584; and *Downes* v. *Bidwell*, *supra*.)

Nor is there anything in the provision in the act of annexation relating to the operation of the Constitution in the annexed territory which militates against the conclusions previously expressed. The text of the resolution on this subject is as follows:

"The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

Now, in so far as the Constitution is concerned, the clause subjecting the existing legislation which was provisionally continued to the control of the Constitution, clearly referred only to the provisions of the Constitution which were applicable and not to those which were inapplicable. In other words, having by the resolution itself created a condition of things absolutely incompatible with immediate incorporation, Congress, mindful that the Constitution was the supreme law, and that its applicable provisions were operative at all times everywhere and upon every condition and persons, declared that nothing in the joint resolution continuing the customs legislation and local law should be considered as perpetuating such laws, where they were inconsistent with those fundamental provisions of the Constitution, which were by their own force applicable to the Territory with which Congress was dealing.

To say the contrary would be but to declare that Congress had provided for the continuance of the tariff and other legislation, whilst at the same time it had enacted that that result should not be brought about. It would, moreover, lead to the assumption that provisions of the Constitution which were inapplicable to the particular situation should yet govern and control that condition.

Mr. Justice McKENNA authorizes me to say that he also concurs in the result for the foregoing reasons.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 219.—October Term, 1902.

The Territory of Hawaii, Appellant, vs. Osaki Mankichi. } Appeal from the District Court of the United States for the Territory of Hawaii.

[June 1, 1903.]

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, dissenting.

In my opinion the final order of the District Court should be affirmed.

Mankichi was tried on an information filed May 4, 1899, charging him with the commission of the crime of murder on March 26 of that year, and was found guilty of manslaughter in the first degree by the verdict of nine jurors. The statutes of Hawaii prior to July 7, 1898, provided for such trial and conviction.

July 7, 1898, the "joint resolution to provide for annexing the Hawaiian Islands to the United States" was approved. 30 Stat. 750. Surrender of sovereignty and possession was effected August 12, 1898.

The act "To provide a government for the Territory of Hawaii" was approved April 30, 1900. 31 Stat. 141.

If Articles of Amendment V and VI were applicable to the Territory of Hawaii after August 12, 1898, the district judge was right, and Mankichi was entitled to be discharged.

The annexation resolution contained three sections, and, omitting the second and third as not material here, is given in the margin.*

By the specific language of this resolution no legislation which was contrary to the Constitution of the United States remained in force.

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*"Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign

The language is plain and unambiguous, and resort to construction or interpretation is absolutely uncalled for. To tamper with the words is to eliminate them.

This is not one of those rare cases where adherence to the letter leads to manifest absurdity as in *United States* v. *Kirby*, 7 Wall. 482, and the illustrations there drawn by Mr. Justice Field from Puffendorf and Plowden.

The argument *ab inconvenienti*, without more, is an unsafe guide, and departure from the plain meaning tends to usurp legislative functions. Besides, that argument has no application here. Courts in Hawaii have had criminal law jurisdiction for more than half a century; and they had power to empanel a grand jury, *United States* v. *Hill*, 1 Brock. 159, and to direct the petit jury of twelve that conviction could only be had by a unanimous verdict.

In giving the instructions which accompanied the joint resolution, Mr. Justice Day, then Secretary of State, under date of July 8, 1898, said: "These recitals, it will be observed, are made in the language of the treaty of annexation, concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated into the joint resolution, because they embodied the terms of cession, which have not only been agreed upon by the two governments, but which have also been ratified by the government of the Republic of Hawaii."

The reference is to a proposed treaty signed by Secretary Sherman on the part of the United States, and by three commissioners on the part of Hawaii, to which the advice and consent of the Senate was not given.

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dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor

The preamble to this treaty expressed the "desire of the Government of the Republic of Hawaii that those islands should be incorporated into the United States as an integral part thereof and under its sovereignty," and that the two governments "have determined to accomplish by treaty an object so important to their mutual and permanent welfare."

The language of the remainder of the treaty is reproduced in the joint resolution, including the provision that the municipal legislation of Hawaii should remain in force when not inconsistent with the resolution or any existing treaty of the United States nor contrary to the Constitution of the United States.

By the resolution Congress provided for the government of Hawaii under the authority of the United States. All the civil, judicial and military powers exercised by the officers in the islands were vested in the appointees of the President, and were to be exercised "in such manner as the President of the United States shall direct." The President prorogued the legislature; reappointed the officers "of the Republic of Hawaii as it existed just prior to the transfer of sovereignty; required such officers to take an oath of allegiance to the United States; and required all bonded officers to renew their bonds to the Government of the United States."

All existing treaties of Hawaii were abrogated; further immigration of the Chinese was prohibited except as allowed "by the laws of the United States;" the customs laws of Hawaii, and its municipal legislation not contrary to the Constitution of the United States, were continued in force until Congress should otherwise determine.

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contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper."

Commissioners were to be and were appointed to recommend to Congress such legislation as they might "deem necessary and proper."

The act of April 30, 1900, was the result of their report, and provided further government, dealing with details, and permanent instead of temporary. But while temporary under the resolution, it was nevertheless a system of government, and the territory was under the sovereignty of the United States and governed by its agencies.

By the resolution the annexation of the Hawaiian Islands became complete, and the object of the proposed treaty, that "those islands should be incorporated into the United States as an integral part thereof, and under its sovereignty," was accomplished.

The exceptions in respect of customs relations and the prohibition of the immigration of the Chinese, embodied in the treaty agreement and in the resolution, could not destroy the effect of incorporation or of the extension of the Constitution. If this were possible, the act of April 30, 1900, would be open to the same objection.

It was said at the bar that the words "contrary to the Constitution of the United States" were inserted as a declaration that certain "fundamental rights and principles, the basis of all free government, which cannot with impunity be transcended," were to be protected in Hawaii; that certain limitations of the Constitution applied "wherever the jurisdiction of the United States extends." But in that view the insertion of the phrase was superfluous and accomplished nothing.

Nor were we informed what those fundamental rights are. This is not a question of natural rights, on the one hand, and artificial rights on the other, but of the fundamental rights of every person living under the sovereignty of the United States in respect of that government. And among those rights is the right to be free from prosecution for crime unless after indictment by a grand jury, and the right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve.

In *Callan* v. *Wilson*, 127 U. S. 540, 549, it was said by Mr. Justice Harlan, speaking for the court: "And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, *and so far as the agencies of the General Government were concerned*, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

Common law rights are described in the Ordinance of 1787 as "fundamental principles of civil and religious liberty," and the amendments embodying common law rights were demanded, as the preamble of the act

of Congress proposing them declares, "in order to prevent misconstruction or abuse" of the powers of the General Government.

Assuming, solely for the sake of argument, that the mere fact of annexation might not in itself have at once extended to the inhabitants of Hawaii all the rights, privileges and immunities guaranteed by the Constitution, and that Congress had the power to impose limitations in that regard, I think not only that Congress did not do so in the particulars in question, but that in re-enacting existing legislation, Congress, by the terms of the resolution, intentionally invalidated so much thereof as in these particulars was inconsistent with the Constitution. The presumptions are all opposed to any capitulation in the matter of common law institutions.

True copy.

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Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 219.—October Term, 1902.

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[June 1st 1903.]

Mr. Justice Harlan, dissenting.

This case is of such exceptional importance in respect of the principles announced by my brethren of the majority, that I deem it not inappropriate to state my views in a separate opinion.

I entirely concur with the Chief Justice in holding that the accused was properly discharged from custody. Whether the legality of his detention be tested by the Constitution, or alone by the Joint Resolution of Congress, approved July 7th 1898, providing "for annexing the Hawaiian Islands to the United States," his imprisonment was, in my judgment, wholly unauthorized.

What, at the time of the arrest and trial of the accused, were the relations existing between the United States and Hawaii? By what law were the personal rights of the people of Hawaii to be then determined? The decision of the case depends upon the answer to these questions.

In 1897 a Treaty was made between the United States and the Republic of Hawaii, which was signed by Secretary Sherman, on behalf of the United States and by three Commissioners on the part of Hawaii. *Senate Report No.* 681, *55th Congress, 2d Sess., March 16th* 1898.

The Preamble to that Treaty expressed the "desire of the Government of the Republic of Hawaii that those Islands shall be *incorporated* into the United States *as an integral part thereof and under its sovereignty.*" It also recited the determination of the two Governments "to accomplish by treaty an object so important to their mutual and permanent welfare."

The Treaty stipulated that until Congress provided for the government of such Islands, all the civil, judicial and military powers exercised by the officers of the existing government in the Islands should be vested in such person or persons, and be exercised in such manner, as the President of the United States directed, and that the President should have power to remove said officers and fill the vacancies so occasioned; also that the municipal legislation of the Hawaiian Islands "not inconsistent with this treaty *nor contrary to the Constitution of the United States*, nor to any existing treaty

of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

The Treaty was not formally ratified, but its object was accomplished by the passage of the Joint Resolution of July 7th 1898. 30 *Stat.* 750.

In order that the full scope of that Resolution may be seen, it is here given in full:

"Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America *all rights of sovereignty of whatsoever kind* in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

"*Resolved by the Senate and House of Representives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

"Until Congress shall provide for the government of such Islands all the civil, judicial, and military powers exercised by the officers of the existing government in said Islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

"The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution *nor contrary to the Constitution of*

the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

"Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

"The public debt of the Repnblic of Hawaii, lawfully existing at the date of the passage of this Joint Resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.

"There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

"The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, *recommend* to *Congress* such legislation concerning the Hawaiian Islands as they may deem necessary or proper.

"§ 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

"§ 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this Joint Resolution into effect." 30 *Stat.* 750.

Under date of July 8th 1898 the Secretary of State transmitted a copy of this Joint Resolution to the United States Envoy Extraordinary and Minister Plenipotentiary accredited to Hawaii, with instructions as to his duty in the premises.

Referring to the Preamble of that Resolution, the Secretary, in his letter of instructions, said: "These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June 1897. They, as well as the other terms of that treaty, were advisedly incorporated in the Joint Resolution, because they embody the terms of cession which have not only been agreed upon by

the two Governments, but which have also been ratified by the Government of the Republic of Hawaii. The Joint Resolution therefore accepts, ratifies and confirms on the part of the United States the cession formally agreed to and approved by the Republic of Hawaii. As by the adoption of the Joint Resolution the cession of the Hawaiian Islands and their dependencies to the United States is thus concluded, it is assumed that no further action will be necessary on the part of the Hawaiian Government beyond the formalities of transfer. Should that Government, however, desire to take any further action, formally confirmatory of what has been done, no objection will be interposed on the part of the United States. When all preliminaries shall have been settled, you are instructed to accept, in the name of the United States, the formal transfer of the sovereignty and property of the Hawaiian Government, and to raise the American flag, with such suitable ceremonies as may be agreed on for the occaision. It may be advisable for the Hawaiian Government to deliver to you an inventory of the public property transferred to the United States. There are several provisions of the Joint Resolution to which it is deemed proper specially to refer. Until Congress shall provide for the government of Hawaii, 'all the civil, judicial and military powers exercised by the officers of the existing Government' are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct. In the exercise of the power thus conferred upon him by the Joint Resolution, the President hereby directs that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies. All such officers will be required at once to take an oath of *allegiance to the United States,* and all the military forces will be required to take a similar oath; and all bonded officers will be required *to renew their bonds to the Government of the United States.* The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease, so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers. The municipal legislation of Hawaii, except such as was enacted for the fulfillment of the treaties between that country and foreign nations, and except such as is inconsistent with the Joint Resolution, or *contrary to the Constitution of the United States,* or to any existing treaty of the United States, is to remain in force till the Congress of the United States shall otherwise determine. The existing customs relations of Hawaii with the United States and with other countries are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the Islands. Under these various provisions, the Government of the Islands will proceed without interruption. Upon the completion of the formalities of the

transfer, your functions as Envoy Extraordinary and Minister Plenipotentiary to Hawaii will necessarily cease. . . These instructions will be borne to you by Rear Admiral Joseph N. Miller, U. S. Navy, who will proceed to Honolulu in the U. S. S. Philadelphia, and who, together with the commander of the United States military forces present, will act with you in the cermonies attending the formal transfer of the Islands to the United States."

So that the Secretary of State gave the representative of the United States to understand that the Joint Resolution and the Treaty had the same object in view, namely, to incorporate Hawaii into the United States "as an integral part thereof and under its sovereignty."

Proceeding in our examination of the history of annexation, we find that under date of August 15th 1898 the United States Minister made his official report as to what was done in execution of the Joint Resolution annexing Hawaii to the United States. That report contains the details of the ceremonies attending the formal transfer of the sovereignty and property of the Hawaiian Government to the United States. From it the following extract is made:

"At a quarter before 12 [on August 12th 1898] the ceremonies opened with prayer, at the conclusion of which I [the United States Minister] arose, and, addressing President Dole, said: 'Mr. President, I present you a certified copy of a Joint Resolution of the Congress of the United States, approved by the President on July 7th 1898, entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States." This Joint Resolution accepts, ratifies, and confirms on the part of the United States the cession formally consented to and approved by the Republic of Hawaii.' . . President Dole, taking the copy of the resolutions, said: 'A treaty of political union having been made, and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America, I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice, and friendship of the American people, yield up to you, as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands;' and, waving his hand to his chief of staff, the Hawaiian flag was saluted by the battery of the Hawaiian National Guard, in which salute our ships in the harbor joined. Then the Hawaiian band played Hawaii Ponoi for the last time, taps were sounded, and the Hawaiian flag came down, and was taken possession of by the Hawaiian corporal of the guard. Then, replying to President Dole, I said: 'Mr. President, in the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government. The admiral commanding the United States naval forces in these waters will proceed to perform the duty intrusted

to him.' Thereupon the American flag was raised as the band played the Star Spangled Banner, and saluted."

The United States Minister then congratulated "his *fellow-countrymen*," on "the inevitable consummation of the national policies and the natural relations between the two countries *now formally and indissolubly united.*" He urged the Hawaiians not to rest content in the enjoyment of free institutions, but "to help maintain them in the spirit they will be extended to you, in the spirit you have sought them, in the spirit of fraternity and equality, in the spirit of the Constitution itself, *now the supreme law of the land.*" The oath of allegiance was thereupon administered by the Chief Justice of Hawaii to the officers of that country, each one swearing that he would "support and defend the Constitution of the United States of America against all enemies, foreign and domestic."

It is thus perceived that the Republic of Hawaii ceded, absolutely and without reserve, to the United States of America, all rights and sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, as well as the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; that the cession was accepted, ratified and confirmed by Congress, and that the Hawaiian Islands and their dependencies were "annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof;" and, what is of vital moment in this case, that such municipal legislation of the Islands as was not "*contrary to the Constitution of the United States,*"—and therefore *only* such legislation as was consistent with that instrument—was to remain in force until Congress otherwise determined. Necessarily, therefore, if regard be had merely to the action of Congress, all local legislation inconsistent with the Constitution ceased to have any force in Hawaii after that country thus passed under the sovereign dominion of the United States.

After the passage of the Joint Resolution, and after the formal transfer of Hawaii to the United States, namely, in 1899, Osaki Mankichi, a subject of Japan, was tried in one of the courts of Hawaii for the alleged crime of murder. He was convicted of the crime of manslaughter in the first degree, and sentenced to imprisonment for twenty years at hard labor. Although the crime was of an infamous nature, there was no presentment or indictment of a grand jury, and the verdict was rendered by only nine of the twelve persons composing the petit jury.

Having been placed in prison pursuant to the verdict and sentence, the accused, in 1901, sued out a writ of *habeas corpus* from the District Court of the United States for the Territory of Hawaii, and was discharged upon the ground that his trial, conviction, sentence and imprisonment were in

violation of the Constitution of the United States, in that he was not proceeded against upon the presentment or indictment of a grand jury, nor found guilty by the unanimous verdict of the petit jury, but only by a majority of the jurors. Hence this appeal.

It should be here stated that by the act of Congress of April 30th 1900, c. 339, a Territorial government was organized over the Islands which had been acquired under the Joint Resolution of 1898, and those Islands were designated as the Territory of Hawaii. In that act provision was made for grand juries, and also for petit juries in criminal cases, to be composed, as at common law, of twelve persons. It was also declared that "no person should be convicted in any criminal case except by unanimous verdict of the jury." 31 *Stat.* 141, 157. It is not contended that that act can have any effect upon the decision of the present case, because the trial, conviction, sentence and imprisonment of the accused all occurred after the formal transfer to the United States pursuant to the Joint Resolution of 1898, and before the passage of the above act of 1900. We must consequently determine the legality of the proceedings against Mankichi by the law as it was between the date of the acquisition of sovereignty over the Islands by the United States and the date of the passage of the act of 1900. To that question I now address myself.

It must be assumed that the trial of the accused was in accordance with the municipal law of Hawaii as it existed prior to the approval of the Joint Resolution of 1898. The contrary is not asserted by the accused. But it is conceded by the court that if the words "contrary to the Constitution of the United States" in that Resolution are interpreted according to their usual, ordinary meaning, and if the validity of the trial be tested by the provisions of that instrument, then the prisoner is entitled to his discharge. Nevertheless, it is now held that although the United States acquired, on the passage of that Resolution, "all rights of sovereignty of whatsoever kind" in and over the Hawaiian Islands and their dependencies; although Hawaii then became "an integral part" of the United States and subject to its "sovereign dominion;" although the United States obtained the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipments and all other public property belonging to Hawaii; although all its officers took an oath of allegiance to the United States; yet, persons there charged with infamous crimes could not, as of right, before the passage of the act of 1900, invoke for their protection, when prosecuted for crime, the guarantees relating to grand and petit juries found in the Constitution of the United States—the supremacy of which instrument was, in effect, declared by the Joint Resolution when existing municipal legislation contrary to its provisions was superseded.

Practically, under the view taken by the court, and so far as those guarantees were concerned, if Congress had not chosen to provide a system of criminal procedure—as it did by the act of 1900—for the government, tribunals and people of Hawaii, then, for an indefinite time, it may have been for a century, the courts in Hawaii, although acting under and by the authority of the United States, might have tried persons there for capital or infamous crimes in a mode confessedly "contrary to the Constitution of the United States." The Constitution, speaking with commanding authority to all who exercise power under its sanction, declares that "*no* person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury;" and it as clearly forbids a conviction in any criminal prosecution except upon the unanimous verdict of a petit jury. In other words, neither the life nor the liberty of any person can be taken, under the authority of the United States, except in the mode thus prescribed. Yet the present holding is that these constitutional requirements need not have been regarded in Hawaii at any time prior to the act of 1900, although that country was an integral part of the United States, and, with its inhabitants, was subject, in all respects, to our sovereign dominion. It follows, under the view of the court, that Congress, by non-action simply, could have kept in force even such municipal legislation of the Hawaiian Islands relating to criminal trials as was in palpable conflict with the Constitution of the United States.

I dissent altogether from any such view. It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who, to use the words of the United States Minister, have become our fellow-countrymen; and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment, neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States. If the accused had committed the crime of murder in the Territory of Arizona; if he had been convicted in any court in that Territory, except under a presentment or indictment of a grand jury and by the unanimous verdict of a petit jury; and if he had been then sentenced to be hanged, and was hanged, the judge of the court pronouncing the sentence would have been guilty of judicial murder. Of that the decisions of this court leave no room to doubt; for it has been adjudged repeatedly that the people of the organized Territories, as well as the people of the District of Columbia, are entitled, by force of the Constitution alone, to the guarantees of life, liberty

and property found in the Constitution. And yet the result of the present judgment is that the hanging of the accused in Hawaii, an integral part of the United States, after a trial for murder committed there, but not upon indictment of a grand jury or on a verdict concurred in by all of the petit jury, could be sustained as legal if the case had arisen at any time prior to the act of 1900. This result has been achieved by the easy method of declaring that when Congress provided that only the municipal legislation of Hawaii not contrary to the Constitution should remain in force, it did not mean what its express words implied according to their ordinary signification; that Congress had no reference to the provisions of the Constitution relating to criminal prosecutions, but intended that the modes of criminal procedure in operation in Hawaii should remain in force until Congress otherwise provided, even if they were, as they are admitted to be, contrary to the Constitution—thus conceding to Congress the power of suspending the constitutional guarantees of life and liberty among a people undeniably subject to the authority and jurisdiction of the United States as completely as are the people of our organized Territories.

Three members of the court, constituting the majority who concurred in the *judgment* in *Downes* v. *Bidwell*, 182 *U. S.* 244, 288, 289, 291, 292, distinctly held that "the Government of the United States was born of the Constitution," and that all the powers enjoyed by it or which it may exercise must be derived either expressly or by implication from that instrument; that that instrument, in respect of every function of the Government, "is everywhere and at all times potential, so far as its provisions are applicable;" that wherever a power is given by the Constitution and a limitation imposed upon its exercise, "such restriction operates upon and confines every action on the subject within its constitutional limits;" that, "as Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject;" that "every provision of the Constitution which is applicable to the territories is also controlling therein;" and that "in the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." In these views the minority in *Downes* v. *Bidwell*, constituting four other members of this court, substantially concurred.

The petit jury system existed in Hawaii long before the passage of the Joint Resolution. But it was inconsistent with the Constitution of the United States, in that it allowed a verdict of guilty in a criminal case by a majority of the jurors. Where was the difficulty in applying in Hawaii the constitutional provision forbidding such a verdict? To have applied

that provision to Hawaii would not, in any essential sense, have imposed upon that country a new system for the trial of crimes. It would have only enforced the existing mode of trial so as to conform to the constitutional requirement in respect of petit juries. It would have left untouched the petit jury system in Hawaii, except as it was contrary to the Constitution. Whatever may be said as to the absence of a grand jury system in Hawaii, it cannot, I think, be said, with any show of reason, that the constitutional provision relating to petit juries was inapplicable in Hawaii after its annexation to this country. Nothing stood in the way of the court instructing the jury in a criminal case, arising after annexation, that unanimity among the jurors as to the verdict was essential under the Constitution.

In my opinion, the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian Islands, and without any act of Congress formally extending the Constitution to those Islands. It then, at least, became controlling, beyond the power of Congress to prevent. From the moment when the Government of Hawaii accepted the Joint Resolution of 1898, by a formal transfer of its sovereignty to the United States—when the flag of Hawaii was taken down, by authority of Hawaii, and in its place was raised that of the United States—every human being in Hawaii, charged with the commission of crime there, could have rightly insisted that neither his life nor his liberty could be taken, as punishment for crime, by any process, or as the result of any mode of procedure, that was inconsistent with the Constitution of the United States. Can it be that the Constitution is the supreme law in the States of the Union, in the organized Territories of the United States, between the Atlantic and Pacific Oceans, and in the District of Columbia, and yet was not, prior to the act of 1900, the supreme law in territories and among peoples situated as were the territory and people of Hawaii, and over which the United States had acquired all rights of sovereignty of whatsoever kind? A negative answer to this question, and a recognition of the principle that such an answer involves, would place Congress above the Constitution. It would mean that the benefit of the constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction. It would mean that the will of Congress, not the Constitution, is the supreme law of the land for certain peoples and territories under our jurisdiction. It would mean that the United States may acquire territory by cession, conquest or treaty, and that Congress may exercise sovereign dominion over it, outside of and in violation of the Constitution, and under regulations that could not be applied to the organized Territories of the United States and their inhabitants.

It would mean that, under the influence and guidance of commercialism and the supposed necessities of trade, this country had left the old ways of the fathers, as defined by a written Constitution, and entered upon a new way, in following which the American people will lose sight of or become indifferent to principles which had been supposed to be essential to real liberty. It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called "dependencies" or "outlying possessions," we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish. Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a colonial system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States—one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law to be declared from time to time by Congress, which is itself only a creature of that instrument.

I stand by the doctrine that the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction. I could not otherwise hold without conceding the power of Congress, the creature of the Constitution, by mere non-action, to withhold vital constitutional guarantees from the inhabitants of a territory governed by the authority, and only by the authority, of the United States. Such a doctrine would admit of the exercise of absolute, arbitrary legislative power under a written Constitution, full of restrictions upon Congress, and designed to limit the separate departments of Government to the exercise of only expressly enumerated powers and such other powers as may be implied therefrom—each department always acting in subordination to that instrument as the supreme law of the land. Indeed, it has been announced by some statesmen that the Constitution should be interpreted to mean not what its words naturally, or usually, or even plainly, import, but what the apparent necessities of the hour, or the apparent majority of the people, at a particular time, demand at the hands of the judiciary. I cannot assent to any such view of the Constitution.

Nor can I approve the suggestion that the status of Hawaii and the powers of its local government are to be "measured" by the Resolution of 1898, without reference to the Constitution. It is impossible for me to grasp the thought that that which is admittedly contrary to the supreme law can be sustained as valid.

I have so far considered the case principally in the light of the results that must, as I think, follow from the interpretation placed by the majority on the Joint Resolution of 1898. But in my judgment Congress should not be held to have intended to do what is now attributed to it. When it declared that the municipal legislation of Hawaii *not* "contrary to the Constitution of the United States" should remain in force, it meant that legislation contrary to that instrument should not remain in force after annexation. Those words were inserted out of abundant caution, to make it certain that no municipal legislation of Hawaii contrary to the Constitution should thereafter be regarded as in force. If the above words did not have that effect, for what purpose were they inserted? What local legislation was declared to be abrogated, if not that which was "contrary to the Constitution?" Under the view taken by the court, those words in the Joint Resolution are made wholly inoperative.

It is said to be evident from the terms of the Joint Resolution that Congress intended it to be merely temporary and provisional. Of course, some further legislation by Congress was contemplated in order to provide a complete territorial government for Hawaii. But in language perfectly direct and explicit, Congress said that *in the meantime* no municipal legislation of Hawaii should be enforced that was "contrary to the Constitution of the United States." And yet a trial conducted in a mode forbidden by that instrument is now sustained as legal.

It is also said that "the *laws* of the United States" were not extended over the Islands until the organic act of April 30th 1900 was passed. But, by the Joint Resolution of 1898 Congress—assuming that action upon its part to that end was necessary–did extend the *Constitution* over the Hawaiian Islands when it declared that the municipal legislation of Hawaii "not contrary to the Constitution of the United States" should remain in force. And yet the court decides that although the trial of Mankichi, if tested by the Constitution, was illegal, it must be sustained from the necessities of the case.

Again, it is said that the words "contrary to the Constitution" in the Joint Resolution referred only to such provisions of that instrument as were *applicable* to Hawaii; and in support of that view, reference is made to that part of the Resolution which keeps alive existing customs regulations between Hawaii and the United States and other countries. It seems to me that the argument based on that clause of the Resolution is misleading and fallacious. Customs regulations are not determined by the

Constitution. The authority to make them is given by that instrument to Congress; and it was for Congress to say what should be the nature of the customs regulations to be observed in Hawaii. Its direction that existing Hawaiian regulations of customs duties should remain in force, until otherwise ordered, was, in legal effect, an adoption of them by Congress for the time being. Now, the provisions as to grand and petit juries are in the Constitution, and could not be altered by Congress under any power it possessed. Their applicability, before civil tribunals, in a territory of the United States, was determinable by the Constitution itself. In other words, if the Constitution was in force at all in Hawaii, prior to the act of 1900, it was in force there for all it ordained, in respect, at least, of the guarantees of life and liberty. To sustain the prosecution of Mankichi upon the ground that Congress did not intend to supersede the local law permitting a verdict in criminal cases by a majority of the petit jury, but did intend to keep such law in force until altered or abrogated by Congress, is, in effect, to say that, if Congress so ordered, persons charged with crime in Hawaii could, consistently with the Constitution, be tried before a single judge. It is not perceived why the argument based upon the provision as to customs regulations does not lead, logically, to such a result, nor how that provision can have any bearing upon the present case, unless it be that the power of Congress over criminal proceedings in Hawaii, involving the life and liberty of a freeman, is as full, comprehensive and complete as it is over mere customs regulations. I cannot go that far in upholding the power of Congress over, what some are pleased to call, our "dependencies" or "outlying possessions," and the "subjects" therein residing.

It is again said that the annexation of Hawaii and the transfer of its sovereignty, of whatsoever kind, to the United States did not so *incorporate* it into the United States as to make the Constitution supreme, in *all* respects, in that newly acquired territory. As the two countries desired that Hawaii, upon annexation, should become "an integral part" of the United States; as all the civil, military and judicial officers of Hawaii were required to take and did take an oath of allegiance to the United States; as Hawaii passed under the "sovereign dominion" of the United States and became subject to all valid laws, civil and criminal, that Congress might enact; as its people may be subjected to punishment for any crime or offense, committed against the United States; as by the authority of Hawaii the Hawaiian flag has come down, and in its place that of the United States substituted; and as Hawaiians cannot rightfully invoke for their protection the authority of any government except that of the United States—in view of these relations between the two countries, it is, to my mind, inconceivable that Hawaii was not so far incorporated into the United States that the Constitution was in force there, after the passage of the Joint Resolution of 1898, in respect, at least, of those personal rights

which that instrument expressly guarded against infringment by any tribunal deriving authority from its provisions.

It is further said that under the Joint Resolution of 1898 any *new* legislation must conform to the Constitution of the United States. This must mean that after the passage of that Resolution the Constitution was operative in Hawaii to prevent new legislation inconsistent with its provisions, but was not operative there so as to prevent the enforcement of local enactments or regulations that were confessedly in violation of that instrument. I cannot forbear saying that this view of the Constitution is most extraordinary. It does not commend itself to my judgment. I had supposed that when the Constitution came into operation in any country or over any people, all local laws, customs, or usages, within the same jurisdiction, that were inconsistent with its provisions, necessarily ceased to have any legal force whatever; otherwise, the declaration of the Constitution, that it was the supreme law of the land, would be meaningless.

But it is said that while *most, if not all,* the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply "*from the moment of annexation,*" yet the two rights created by the constitutional provisions as to grand and petit jurors "are not fundamental in their nature, but concern merely a method of procedure."

It is a new doctrine, I take leave to say, in our constitutional jurisprudence, that the framers of the Constitution of the United States did not regard those provisions, and the rights secured by them, as fundamental in their nature. It is an indisputable fact in the history of the Constitution that that instrument would not have been accepted by the required number of States, but for the promise of the friends of that instrument, at the time, that immediately upon the adoption of the Constitution, amendments would be proposed and made that should prevent the infringement, by any *Federal* tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights, according to universal belief at that time, were those secured by the provisions relating to grand and petit juries. Whatever may be the power of the States in respect of grand and petit juries, it is firmly settled that the Constitution absolutely forbids the trial and conviction, in a *Federal* civil tribunal, of any one charged with crime, otherwise than upon the presentment or indictment of a grand jury, and the unanimous verdict of a petit jury, composed, as at common law, of twelve jurors.

In *Ex parte Milligan,* 4 *Wall.* 120, 121, the accused, not in the army of the United States, was tried by a Federal military court-martial for a crime against the United States, alleged to have been committed in a State that adhered to the Union, and he was denied the right to a trial by jury. This court, referring to the provisions of the Federal Constitution relating to criminal offenses and proceedings, said: "These securities for personal

liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. . . Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government."

In *Ex parte Bain*, 121 *U. S.* 1, 12, 13, the court, referring to the constitutional provision relating to grand juries, said: "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did . . in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged."

In *Thompson* v. *Utah*, 170 *U. S.* 343, 349, 350, 351, which was a case arising in an organized Territory, the question was whether the jury referred to in the original Constitution of the United States, and in the Sixth Amendment, was a jury constituted as it was at common law of twelve persons, neither more nor less. This court said: "When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. . . When Thompson committed the offense of grand larceny in the Territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. . . When Thompson's crime was committed, it

was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."

Nevertheless, it is contended that the constitutional provisions in question are not fundamental in their nature; that whether a person, charged, for instance, with murder, shall be convicted and hung, pursuant to a verdict rendered by a majority of the petit jury, rather than by all the jurors, is only "a method of procedure." My judgment refuses assent to this doctrine. I believe it to be most mischievous in every aspect. The provisions as to grand and petit juries are in the Constitution, and the mandatory character of that instrument ought not to be disregarded. What tribunal, deriving its authority from the United States, can rightfully hold them to be immaterial? Whether those provisions are fundamental in their nature or not, no Federal civil tribunal, existing under the Constitution, and under a solemn obligation to maintain and defend it, can properly or safely ignore them. If the local law, under which Mankichi was tried and convicted, was contrary to any provision of the Constitution, that instrument should have been respected, whatever the nature of such provision.

The opinion of the court contains observations to the effect that some persons, heretofore convicted of crime in the Hawaiian courts, will escape punishment if the Joint Resolution of 1898 is so interpreted as to make Congress mean what, it is conceded, the words "contrary to the Constitution of the United States" naturally import. In the eye of the law, that is of no consequence. The cases cited by the court fall far short of sustaining the proposition that the court may reject the plain, obvious meaning of the words of a statute in order to remedy what it deems an omission by Congress. The consequences of a particular construction may be taken into account only when the words to be construed are ambiguous. If, after the passage of the Joint Resolution, the local authorities proceeded in the prosecution of crimes under municipal laws palpably contrary to the Constitution, the fault was theirs. They were informed by the Joint Resolution of 1898, by the Secretary of State, as well as by the Proclamation of President McKinley announcing the annexation of Hawaii to the United States, that only local legislation not contrary to the Constitution should remain in force. Their fault cannot justify the court in disregarding the express command of Congress that only municipal legislation that was consistent with the Constitution should remain in force in Hawaii. If the accused is held in palpable violation of that instrument, we cannot shrink from discharging him because of its effect upon convictions in other cases. We must interpret the law as it is written. As just stated, the doctrine is well settled that when the meaning of a statute is plain, there is no room for interpretation. The consequences are for the lawmaking power. If the

intention of the legislature "is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judiciary are not at liberty, on considerations of policy or hardship, to depart from the words of the statute; they have no right to make exceptions, or insert qualifications, however abstract justice or the justice of the particular case may seem to require it." *Sedgwick on Constr. of Stat. & Const. Law*, 253, 328. "We are bound to take the act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws." *Jones* v. *Smart*, 1 *T. R.* 44, 52. "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, *ita lex scripta est*, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice, than mere policy and convenience." *Story on Const. vol. I, sec.* 426. "I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute, when free from ambiguity and doubt; without indulging a speculation, either upon the impolicy, or the hardship, of the law." Mr. Justice Chase in *Priestman* v. *United States*, 4 *Dall.* 30, *note.* When therefore Congress, in words perfectly clear and free from doubt, declared that the municipal legislation of Hawaii, not contrary to the Constitution, should remain in force, does not the court usurp the function of making laws, when it rules that certain municipal legislation of Hawaii was in force, although it was manifestly contrary to the Constitution? Can it depart from the plain, distinct words of the statute upon any ground of policy or to remedy an omission by Congress?

I am of opinion: 1. That when the annexation of Hawaii was completed, the Constitution—without any declaration to that effect by Congress, and without any power of Congress to prevent it—became the supreme law for that country, and, therefore, it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury. 2. That if the legality of such trial and conviction is to be tested alone by the Joint Resolution of 1898, then the law is for the accused, because Congress, by that Resolution, abrogated or forbade the enforcement of any municipal law of Hawaii so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the Resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret, the law.

The judgment of the District Court of the United States for Hawaii discharging the accused should be affirmed.